# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~150~~ 197.

WILLIAM DUGALD STUART, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF EASTON AND THE COUNTY OF NORTHAMPTON.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FILED JULY 13, 1896.
CERTIORARI AND RETURN FILED DECEMBER 10, 1896.

(16,335.)

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(16,335.)

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*vs.*

THE CITY OF EASTON AND THE COUNTY OF NORTHAMPTON.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA, *ss:* (1)

To the President of the United States.

*To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:*

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between William Dugald Stuart, an alien, a subject of the Queen of Great Britain, residing in London, England, *vs.* the City of Easton and the County of Northampton, corporations of the State of Pennsylvania, citizens of said State and residing in the Eastern District thereof, a manifest error hath happened, to the great damage of the said plaintiff as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 10th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

SAMUEL BELL,

Clerk of the Circuit Court of the United States, Eastern District of Pennsylvania.

Allowed by Geo. M. Dallas, Cir. Judge.
May 10, 1895.

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UNITED STATES OF AMERICA, *ss:* (2)

To the President of the United States.

To the City of Easton and the County of Northampton, *Greeting:*

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error,

filed in the Clerk's Office of the Circuit Court of the United States in and for the Eastern District of Pennsylvania in the Third Circuit, wherein William Dugald Stuart is plaintiff in error, and you are defendant in error, to shew cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, Judge of the Circuit Court of the United States this day of May, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE M. DALLAS, Cir. J.
May 10th, 1895.

(3) May 13, 1895. Service is hereby accepted. Aaron Goldsmith, Attorney for the City of Easton. Edw. J. Fox, Attorney for the County of Northampton.

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(4) IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE THIRD CIRCUIT.

April Session 1888. No. 51.

WILLIAM DUGALD STUART, an alien and subject of the Queen of Great Britain, resident in England,

*vs.*

CITY OF EASTON and COUNTY OF NORTHAMPTON, corporations incorporated under the laws of the State of Pennsylvania and citizens of the said State, residents in the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

Pleas and proceedings before the Honorable the Judges of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, of April Session, 1888, No. 51.

It is thus contained:

Be it remembered that on the twenty-sixth day of July, A. D. 1888, William Dugald Stuart by his Attorney C. Berkeley Taylor, Esquire, comes into our Court here and sues forth therefrom a writ of summons in ejectment against the City of Easton and the County of Northampton which with the endorsement and return thereto is in the words and figures following, to wit:

UNITED STATES.
EASTERN DISTRICT OF PENNSYLVANIA. } *sct.* (5)

THE PRESIDENT OF THE UNITED STATES,

*To the Marshal of the Eastern District of Pennsylvania, Greeting*:

We command you, that you summon the City of Easton and the County of Northampton, corporations of the State of Pennsylvania, late of your District, if they may be found therein, so that they be and appear before the Judges of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, at a session of the same Court, to be holden at Philadelphia, on the first Monday of August next, then and there to answer to a certain complaint made by William Stuart, a citizen of London, England, that the said defendants now have in their actual possession a lot of ground situate in the City late town of Easton and County of Northampton and State of Pennsylvania in the centre of the great square of said town containing eighty feet in length north and south and eighty feet in breadth east and west together with all ways, waters, water courses, liberties, easements, privileges, profits, commodities, advantages and appurtenances thereunto belonging (being at the intersection of Third and Northampton avenues in said City) the right of possession or title to which he, the said William Stuart, says is in him and not in the said the City of Easton and County of Northampton, all of which he the said William Stuart avers he is prepared to prove before our said Court. Hereof fail not. And you have then there this writ.

Witness the Honorable Samuel F. Miller, Senior Associate | Chief Jus- (6)
tice of the Supreme Court of the United States, at Philadelphia, this twenty-sixth day of July, A. D. 1888, and in the 113th year of the Independence of the United States.

[SEAL]

SAMUEL BELL,
*Clerk of the Circuit Court, U. S.*

Return: July 27, 1888. Served on the City of Easton and the County of Northampton by giving a true and attested copy of the within writ to Charles F. Chidsey, Mayor of the said City of Easton, and by giving a like copy to Richard Deemer and Edwin D. Shortz, two of the Commissioners of the said County of Northampton, and making known the contents thereof to each of them respectively.

James L. Marshall being duly sworn according to law deposes and says that he served the within writ in manner and form and at the time as set forth in the above return.

JAMES L. MARSHALL,
*Deputy U. S. Marshal.*

Sworn and subscribed this 6th day of August, A. D. 1888.

W. VON A. WILLIAMSON,
*Pro. Clerk C. C. U. S.*

Endorsed: No. 51. April Session, 1888, Circuit Court, U. S. Stuart *vs.* The City of Easton *et al.* Summons in ejectment. Returnable on the first Monday of August next. C. Berkeley Taylor, Attorney for Plaintiff.

(7) And thereupon, afterwards, to wit, on the fifteenth day of June, A. D. 1889, the defendant, the City of Easton, came into Court here and files its pleas as follows, to wit:

| | |
|---|---|
| STUART | U. S. C. C. |
| *vs.* | Eastern District of Penna. |
| EASTON, *et al.* | April Session, 1888. |
| | No. 51. |

And now, to wit, June 13, 1889, the City of Easton, one of the above defendants, by Aaron Goldsmith pleads "Not Guilty."

AARON GOLDSMITH,
*Atty for City.*

To Samuel Bell, Clerk U. S. C. C.

Endorsed: U. S. C. C., Eastern District, Pa. 51 April Session 1888. Stuart *vs.* City of Easton. Defendant's Plea. Filed June 15, 1889.

(8) And thereupon afterwards, to wit, on the fifteenth day of March, A. D. 1889 the defendant, the County of Northampton by its Attorney H. S. Cavanaugh, Esq., comes into Court here and files its plea as follows, to wit:

| | |
|---|---|
| STUART | U. S. C. C. Eastern Dist. Penna. |
| *vs.* | April Session 1888. |
| EASTON, *et al.* | No. 51. |

And now, to wit, March 14, 1889, the County of Northampton, one of the above defendants, by H. S. Cavanaugh, Esq., pleads "Not Guilty."

H. S. CAVANAUGH,
*Attorney for the County of Northampton.*

To Samuel Bell, Clerk C. C. U. S.

Endorsed: C. C. U. S. East. Dist. of Pa. 51 April Session 1888. Stuart *vs.* Easton. Pleas of Northampton Co. Filed March 15, 1889. Cavanaugh.

| | |
|---|---|
| WM. STUART<br>*vs.*<br>CITY OF EASTON AND<br>COUNTY OF NORTHAMPTON. | United States Circuit Court.<br>Eastern District of Pennsylvania.<br>April Sessions, 1888. No. 51. |

(9)

And now, to wit, February 19, 1895, Wm. Stuart, by his attorneys C. Berkeley Taylor, A. T. Freedley, and Wm. Brooke Rawle, Esquires, moves the Court for a rule upon the defendant to amend the record so that the title of the said cause shall read as follows:

Wm. Stuart, an alien, a subject of the Queen of Great Britain *vs.* the City of Easton and County of Northampton, corporations incorporated under the laws of the State of Pennsylvania and citizens of the Eastern District of Pennsylvania, returnable on Tuesday, February 12, 1895.

C. BERKELEY TAYLOR,
*Attorney for Plaintiff.*

Endorsed: U. S. C. C. Eastern Dist. of Pa. April Session 1888. No. 51. Stuart *vs.* Easton. Motion to amend. Filed February 19, 1895. Samuel Bell, Clerk. C. B. Taylor, A. T. Freedley, Wm. Brooke Rawle.

| | |
|---|---|
| WM. STUART<br>*vs.*<br>CITY OF EASTON AND<br>COUNTY OF NORTHAMPTON. | United States Circuit Court.<br>Eastern District of Pennsylvania.<br>April Sessions, 1888. No. 51. |

(10)

STATE OF PENNSYLVANIA }
CITY OF PHILADELPHIA. } *ss.*

F. F. EASTLACK, Jr., being duly sworn deposes and says that he is acquainted with Wm. Stuart, the plaintiff in the above case, that he knows him to be an alien, a subject of the Queen of Great Britain, and resident in the City of London, and further saith not.

FRANCIS F. EASTLACK, JR.

Sworn and subscribed to before me this ninth day of February, A. D. 1895.

THOS. W. HOSKINSON,
*Notary Public.*

[SEAL]

Endorsed: U. S. C. C. Eastern Dist. of Pa. April Sessions, 1888. No. 51. Stuart *vs.* Easton. Affidavit. Filed February 19, 1895. Samuel Bell, Clerk, C. B. Taylor, A. T. Freedley, Wm. Brooke Rawle.

(11)

| | |
|---|---|
| WM. STUART | U. S. Circuit Court. |
| *vs.* | Eastern District of Pennsylvania. |
| CITY OF EASTON AND | April Sessions, 1888. |
| COUNTY OF NORTHAMPTON. | No. 51. |

AND NOW, this 19th day of February, 1895, on motion of counsel for plaintiff, counsel for defendant having been notified and not appearing or objecting thereto, it is ordered that the title of the case be amended so as to read as follows:

Wm. Stuart, an alien, a subject of the Queen of Great Britain *vs.* the City of Easton and County of Northampton, corporations, incorporated under the laws of the State of Pennsylvania and citizens of the State of Pennsylvania," and that in the statement of all subsequent pleadings and papers whenever the words "Wm. Stuart a citizen of London, England" occur the same shall be amended so as to read "Wm. Stuart, an alien, a subject of the Queen of Great Britain," and that wherever the names of the "City of Easton and County of Northampton" occur the same shall be amended so as to read, "The City of Easton and County of Northampton, incorporations, incorporated under the laws of the State of Pennsylvania and citizens of said State of Pennsylvania."

GEO. M. DALLAS,
*Circuit Judge.*

Endorsed: 51 U. S. C. C. Eastern Dist. of Pa. Apl. Sessions, 1888. Stuart *vs.* Easton. Order amending record. Filed February 19, 1895. Samuel Bell, Clerk of Court. C. B. Taylor, W. Brooke Rawle, A. T. Freedley.

(12)

| | |
|---|---|
| STUART | United States Circuit Court. |
| *vs.* | April Sessions, 1888. |
| EASTON. | No. 51. |

And now, to wit, the third day of April, A. D. 1895, it is agreed by and between counsel in the above cause as follows:

That William Stuart, the plaintiff above named, has since the commencement of the present suit departed this life, and that his son, William Dugald Stuart, an alien and subject of the Queen of Great Britain, resident in England, has become entitled to all the rights of the said William

Stuart in Pennsylvania, and that therefore it is agreed that his name shall be substituted upon the record in the place of the said William Stuart.

It is further agreed that the said William Dugald Stuart, and William Stuart and his father William Stuart, Thomas Gordon Penn, Granville John Penn and Richard Penn, successors in estate to Richard and Thomas Penn, proprietaries of Pennsylvania since 1850, have been each and all of them aliens and subjects of the Queen of Great Britain, resident in England.

That the City of Easton and County of Northampton are corporations incorporated under the laws of the State of Pennsylvania and citizens of the said State resident in the Eastern District of Pennsylvania.

C. B. TAYLOR,
*Attorney for Wm. Dugald Stuart.*
H. J. STEELE,
*Attorney for the City of Easton.*

Endorsed: U. S. C. C., East. Dist. of Pa. No. 51. April Sess., 1888. Stuart *vs.* Easton.

Agreement as to substitution and other facts. Filed April 3, 1895. Samuel Bell, Clerk. C. B. Taylor, A. T. Freedley, Wm. B. Rawle.

And thereupon it is ordered that a jury come to try the issue joined in (13)
this case.

And afterwards, to wit, on the third day of April, A. D. 1895, a jury being called come, to wit:

| | |
|---|---|
| Charles A. Meck, | John C. Eckles, |
| John C. Harlacker, | Walter Wood, |
| Samuel M. Fite, | Alex. J. Zellner, |
| Robert H. Conlyn, | M. V. B. Vanartsdalen, |
| Robert S. McClure, | Edward Stroh, |
| George W. Eaby, | William Schneider, |

who are duly empaneled, returned chosen, tried, and sworn or affirmed to speak the truth, etc., in the issue joined in this case.

And afterwards, to wit, on the day and year last aforesaid, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say that they find for the defendants.

| | | |
|---|---|---|
| STUART | U. S. C. C. East Dist. Pa. | (14) |
| *vs.* | April Sess., 1888. | |
| EASTON. | No. 51. | |

And now, to wit: April 4, 1895 (1895), the plaintiff by his attorneys moves for a new trial in the above cause and assigns the following reasons:

1. Because the Court took the case away from the Jury.
2. Because the Court directed a verdict for the defendant.
3. Because the Court did not direct a verdict for the plaintiff.

4. Because the verdict was against the law.

5. Because the verdict was against the evidence.

C. BURKELEY TAYLOR,
*Attorney for Plaintiff.*

Endorsed:—51. U. S. C. C. East. Dist. Pa. April Sess., 1888. Stuart *vs.* Easton.

Motion and reasons for a new trial. Filed April 6, 1895.

SAMUEL BELL,
*Clerk.*

(15

C. B. TAYLOR.

And afterwards, to wit, on the sixth day of April, A. D. 1895, came the parties aforesaid, by their attorneys aforesaid, and this cause being called for argument on a motion for a new trial, and having been argued by counsel for the respective parties, and the court being fully advised in the premises, it is ordered that the motion for a new trial be and the same is hereby denied and judgment ordered to be entered on the verdict in favor of defendants and against the plaintiff.

Whereupon judgment is entered accordingly.

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(16) IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

April Sessions, 1888, No. 51.

WILLIAM DUGALD STUART, an alien, a subject of the Queen of Great Britain, residing in London,

*vs.*

THE CITY OF EASTON AND COUNTY OF NORTHAMPTON, corporations incorporated under the laws of the State of Pennsylvania and citizens of said State, residing in the Eastern District of Pennsylvania.

BE IT REMEMBERED, that in the term of Aprill, A. D. 1895, came the said plaintiff into the said Court, and impleaded the said defendants in a certain plea of ejectment, etc., in which the said plaintiff declared (prout Narr) and the said defendant pleaded (prout pleas), and thereupon issue was joined between them.

And afterwards, to wit, at the sessions of said Court held at the City of Philadelphia aforesaid before the Honorable Dallas, Judge of the said Court, on Wednesday and Thursday, the third and fourth days of April, A. D. 1895, the aforesaid issue between the said parties came to be tried by a jury of the said District duly impanneled (prout list of jurors), on which day came as well the said plaintiff as the said defendants by their respective attorneys and jurors of the jury aforesaid impanneled to try the said issue, and also called, came, and were then and there in due

manner chosen and sworn or affirmed, to try the said issue, and upon the trial the counsel of the said plaintiff offered the following, to wit:

Plaintiff's counsel offers in evidence from Dallas' Laws, First Volume, (17) an Act of Assembly of 1752, creating and erecting the County of Northampton at that time; that is, such sections of it as affect this case, as follows:

"Whereas, a great number of the inhabitants of the upper parts of the County of Bucks, by their petition, have humbly presented to the Governor and Assembly of this Province, the great hardships they lay under by being so remote from the present seat of judicature and the public offices and the necessary means to be used for obtaining justice is attended with so much difficulty and expense, and many forego their right rather than attempt the recovery of it under such circumstance, while others, sensible of their difficulties, commit great violence with impunity. For remedying whereof and for the relief of the inhabitants: Be it Enacted, that all and singular the lands lying within the Province of Pennsylvania aforesaid be erected into a County, and the same is hereby erected into a County, named and henceforth to be called Northampton, to be divided from the County of Bucks by the upper or northward line of Durham Tract, to the upper corner thereof, then from a straight line to be run southwestwardly to the line dividing the townships of Upper and Lower Milford, then along the said line to the line dividing Philadelphia and Bucks Counties, and then by that line to the extremity of the said Province."

Also, the Sixth Clause, as follows: "And be it further enacted that it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs, of a piece of land situated in some convenient place in the said town, in trust and for the use of the inhabitants of the said County, and | thereon to erect a building, (18) a Court house and prison sufficient to accommodate the public service of the said County, and for the ease and convenience of the inhabitants."

Also a copy of the Act of 1763, not published, the copy being a certified copy from the Land Office, which is offered under an agreement in the case. Exhibit No. 1.

Also, the warrant for the deeds of the Court House lot. Exhibit No. 2.

Also, the survey which followed that warrant. Exhibit No. 3.

Also, the Patent to the Trustees for this lot. Exhibit No. 4.

Also, the pedigree that has been agreed to by counsel, with the agreement filed in this case, to show that the present plaintiff is the proper plaintiff in the case as the representative of Thomas and Richard Penn. Exhibit No. 5.

Also, an agreement entered into by counsel in this case, as to certain of the facts, and in which the admissibility of these facts and their relevancy are still to the Court to determine. Exhibit No. 6.

Plaintiff's counsel offers in evidence an Act of Assembly of 1780,

Dallas' Laws, as to the vesting of the various Court House properties in the State of Pennsylvania, so much of it as reads as follows:

"And all and singular the Court Houses, goals, prisons and work houses, together with the lots of land whereon they severally stand, or which are appurtenant to them, of and in the several Counties of this State, as they are now or heretofore have been vested in any feoffees or trustees, or in any bodies politic and corporate for the several use of the said Counties respectively: and also all other real estate to the good people of this Commonwealth, or of any County thereof, in their public
(19) and collective | capacity belonging, or to their use or interest vested and conveyed, shall be, and hereby are, vested in the Commonwealth, freed and discharged, and absolutely acquitted, exempted and exonerated of, from and against all claims and demands of the said feoffees or trustees, or bodies politic and corporate, or of the survivors and survivor of such feoffees and trustees, and every of them, and of the heirs of such survivors and survivor forever; subject however to the several uses, intents, trusts, dispositions and direction, for which the same have been heretofore respectively appointed and limited, and to none other; saving and always reserving to every person and persons, bodies politic and corporate, his and their heirs, successors, other than the said feoffees and trustees, all such estates, right, title and interest, of, into and out of the premises vested in trust as aforesaid, as they, every or any of them, had before the passing of this Act, or could or might have had or enjoyed, in case this Act had not been made or passed."

Also, section 9, of the Act of the 15th day of April, 1834, as follows:

"The titles to all and singular the Court Houses, jails, prisons and work houses, together with the lots of land thereunto belonging or appertaining, in the several Counties of this State, as they are now, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the Commissioners of the respective Counties, or in any bodies politic or corporate, for the several use of the said Counties respectively, shall be, and they are hereby declared to be, vested in the respective Counties for the use of the people thereof, and for no other use."

Also, the survey of 1,000 acres of land, with the allowance, six per cent., surveyed October 8th, 1736, being a copy from the Land Office
(20) marked No. 47, showing a survey of the tract of land | upon which the town of Easton lay. This for the purpose of showing that the property on which the town of Easton lay was surveyed by the proprietaries and the survey filed in the Land Office prior to the Divesting Act: (Exhibit No. 7.) and an extract from the book of proprietary rights in the Land Office, showing that No. 47 was the 1,000 acres reserved by the proprietaries themselves. (Exhibit No. 8.)

Counsel for the defendants object to the offer for the reason that the Divestitory Act reserved only to the proprietaries such lands as were surveyed and returned into the land office prior to July 4, 1776, and the paper which is offered in evidence does not show that it was made in pursuance of any warrant for a survey issued by the proprietaries, nor does

the paper show proper return to such warrant as having been made by any authorized person whatever on behalf of the proprietaries.

Offer admitted in evidence. To which ruling counsel for defendants excepts.

Also, a properly certified plan of the town of Easton, being numbered 112. (Exhibit No. 9.)

Also, a certificate from the book of proprietary rights, showing the page upon which No. 112, of the plan of Easton, is entered. (Exhibit No. 10.)

Also, certified copy of the deed referred to in the Acts of 1752 and 1763, for the prison lot of land, showing the grant. Offered to show the grant of just such an estate granted in this case, to be followed by a subsequent grant and the reversion by Penn to the county; the two papers to be used as an estoppel, as evidence of an estoppel upon the county from setting up that this is not an estate upon condition. (Exhibit No. 11.)

Defendants' counsel objects.

Offer excluded. To which ruling the plaintiff's counsel excepts. (21)

Also, the deed by Granville John Penn and Richard Penn to the County of Northampton, dated in 1852, for the reversion in the prison lot. Offered for two purposes; first, for the former purpose of establishing and using with the jury to show an estoppel upon the county; and second, to show grants by Penn of land in the township of Easton subsequent to the Divesting Act; to be followed by other deeds made by Penn subsequent to the Divesting Act. (Exhibit No. 12.)

Defendants' counsel objects to the offer as being incompetent and entirely irrelevant.

Offer excluded. To which ruling counsel for plaintiff excepts.

Also, a deed by John Penn to Peter Schuyler, *et al.*, for a lot in the County of Easton, subsequent to the Divesting Act. (Exhibit No. 13.)

Defendants' counsel objects to the offer for the same reason.

Offer excluded. To which ruling plaintiff's counsel excepts.

Also, a certified copy from the books of the land office, showing that the records of the Department of Internal Affairs of Pennsylvania show a number of warrants issued for lots in the town of Easton, Pa., and surveys made in pursuance thereof, and lots granted by the proprietaries of the Province of Pennsylvania.

*Second.* That no evidence can be found to indicate that any warrants were issued, and surveys made or patents granted by the Commonwealth of Pennsylvania, for any lots in the town of Easton, Pa. (Exhibit No. 14.)

Defendants' counsel objects to the offer.

Offer excluded. To which ruling plaintiff's counsel excepts.

Also, agreement of counsel filed this day suggesting the death of (22)
William Stuart and substituting William Dugald Stuart, an alien, subject of the Queen of Great Britain, resident in England as plaintiff, and

agreeing that he is such an alien and that his predecessors in title were also aliens as far back as 1850, and that the City of Easton and County of Northampton are citizens of Pennsylvania residing in the eastern district thereof. (Exhibit No. 15.)

Plaintiff rests.

Adjourned until Thursday, April 4, 1895, at 10 o'clock A. M.

Defendants counsel asks the Court to direct a verdict in favor of the defendants.

Charge of the Court, Dallas, *J.*

GENTLEMEN OF THE JURY:—This case was tried some years ago and an appeal taken to the Supreme Court of the United States, which reversed the judgment then entered for a technical reason, which has since been cured: under the circumstances I think it wise to read to you the charge delivered by the Court at the last trial, as follows:

(23) This is an action brought to recover possession of a piece of land in the City of Easton, Pennsylvania, belonging originally to William and Richard Penn, and the plaintiff here claims as a descendant.

The land was conveyed many years ago to certain trustees named in deed for the erection of a court house for public use and service in Northampton county, and for no other use, intent, or purpose.

The right of the plaintiff to recover here depends upon the effect of that deed, and the defendants now asks the Court in view of all the evidence introduced by the plaintiff to say that he has failed to make out his claim and that he is not entitled to this property. It does seem to me that on the face of this deed to these trustees it was not for their own use and benefit but for the use and benefit of the people of Northampton county in the erection and use of public buildings. It is therefore a trust, it seems to me, and the plaintiff has no interest in this question whatever.

If this land has been diverted to any other purpose than the one named in the deed it does not effect his interest in any way but effects only those for whose use the conveyance was made, and he has therefore no right to maintain any action of ejectment for the recovery of this land on the ground that it was not conveyed irrevocably by the deed from the Penns.

I therefore instruct you that such is the effect of the conveyance and the plaintiff is not entitled to maintain this action and your verdict should therefore be for the defendant.

Counsel for plaintiff excepts to the binding instruction to the Jury to find for the defendant and the exception is thereupon noted.

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(24) [L. S.] EXHIBIT No. 1.

JAMES HAMILTON.

An Act to enable certain persons therein named to erect a court house at Easton in the County of Northampton, and to levy a tax on the inhabitants of the said County to defray the expense thereof.

WHEREAS. By an Act passed in the twenty-first year of the reign of the late King George the Second, entitled "An Act for erecting the northwest part of Bucks into a separate County" it was enacted that Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them should purchase and take assurance to them and their heirs of a piece of land situated in some convenient place of the Town of Easton within the County of Northampton in trust and for the use of the inhabitants of the said County and thereon to erect and build a court house and prison sufficient to accommodate the public service of the said County and for the ease and convenience of the inhabitants, and that for the defraying the charges of purchasing the land, building and erecting the court house and prison aforesaid, it should be lawful for the commissioners and Assessors of the said County or a majority of them to assess and levy so much money as the said trustees or any three of them should judge necessary for purchasing the land and finishing the said Court-house and prison, provided the sum of money so to be used raised did not exceed three hundred pounds current money of this Province.

AND WHEREAS, the said trustees have already raised and expanded | (25)
the sum of three hundred pounds and upwards in building a prison in the town of Easton in pursuance of the act hereinbefore mentioned and as no other provision is made by the said act for raising any further sums of money for the purpose aforesaid whereby the good purposes of the said act may be defeated.

FOR REMEDY WHEREOF, BE IT ENACTED by the Honorable James Hamilton, Esquire, Lieutenant-Governor under the Honorable Thomas Penn and Richard Penn, Esquires, true and absolute Proprietaries of the Province of Pennsylvania and Counties of New Castle, Kent, and Sussex, upon Delaware, by and with the advice of the Representatives of the Freemen of this province in General Assembly met and by the authority of the same, that it shall and may be lawful for the Commissioners and Assessors of the said County of Northampton or a majority of them, to assess and levy and they are hereby authorized and required to assess and levy so much money of the said County as John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse Gentlemen, or any three of them, shall judge necessary for building a court house and finishing the prison already erected, provided the sum so raised shall not exceed the sum of four hundred and fifty pounds current money of this Province anything in this Act or in the Act hereinbefore mentioned to the contrary notwithstanding.

Signed by the order of the House,

ISAAC NORRIS,
*Speaker.*

Passed by the Governor the fourth day of March in the third year of his Majesty's reign, Annoque Domini one thousand seven hundred and sixty-three.

By His Honour's Command,

JOSEPH SHIPPEN, JR.,
*Secretary.*

(26) OFFICE OF THE SECRETARY OF THE COMMONWEALTH.

*Harrisburg, September 28th, A. D. 1889.*

PENNSYLVANIA, *ss:*

I DO HEREBY CERTIFY, That the foregoing and annexed is a full, true and correct copy of the original Act of the General Assembly, of the Province of Pennsylvania entitled "An Act to enable certain persons therein named to erect a Court House at Easton in the County of Northampton and to levy a tax on the inhabitants of the said County to defray the expense thereof," as the same remains on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Secretary's Office to be affixed the day and year above written.

J. H.,

*Deputy Secretary of the Commonwealth.*

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(27) EXHIBIT No. 2.

PENNSYLVANIA, *ss.*

*By the Proprietaries.*

WHEREAS, in and by an act of General Assembly of this Province, intitled "An Act of erecting the Northwest part of Bucks into a separate County" which in and by the said act is called Northampton and Thomas Craige, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed Trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the said County, and thereon to erect and build a Court-House and Prison sufficient to accommodate the public service of the said County, and for the ease and convenience of the inhabitants, as in and by the said act appears. And Whereas on application and request of said Trustees, and out of our regard to encourage and promote the Improvement of the said Town, and general good and convenience of the inhabitants of the said County, we have condescended and agreed to grant to the said trustees a lot or piece of ground of Eighty Feet square to be laid out in the centre of the great square in the middle of the said Town of Easton, for a Court House for the use and the accommodation of the inhabitants of the said town and County forever: These are therefore to require you to survey and lay out or cause to be surveyed and laid out, a lot or piece of ground in the centre of the great Square in the said Town of Easton of the said dimensions of Eighty feet square for the public use of a court house for the inhabitants of the said town and county, and make return thereof into our Secretarys Office in order for confirmation to the said Trustees and their heirs for the use aforesaid, and for your so doing this shall be your sufficient Warrant:

Given under my hand and the seal of the Land Office, by virtue of certain powers from the said Proprietaries at Philadelphia the ninth day of July 1762.

To JOHN LUKENS,
*Surveyor General.* JAMES HAMILTON.

IN TESTIMONY, That the above is a copy of the original remaining on file in the Department of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the seal of the said Department to be affixed at Harrisburg, this Twenty-seventh day of September, A. D. 1889.

[SEAL] ISAAC B. BROWN.

*Deputy Secretary of Interna Affairs.*

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EXHIBIT No. 3. (29)

In pursuance of a Warrant dated the 9th. day of July 1762. Surveyed the 8th. day of October 1763 to Thomas Craig and others the above described Lot of Ground Situate in the Public Square of the Town of Easton in the County of Northampton. Containing in length North & South eighty feet and in breadth East & West eighty feet.

P. JAMES SCULL.

IN TESTIMONY, That the above is a copy of the original remaining on file in the Department of Internal Affairs of Pennsylvania, I have here-

unto set my hand and caused the seal of the said Department to be affixed, at Harrisburg, the first day of October, 1889.

[SEAL] ISAAC B. BROWN,
*Deputy Secretary of Internal Affairs.*

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(30) EXHIBIT No. 4.

Patent to John Jones
& ors Trustees &c.

Thomas Penn & Richard Penn Esquires true and absolute Proprietaries and Governors in Chief of the Province of Pennsylvania & Counties of Newcastle Kent and Sussex upon Delaware To all unto whom these Presents shall come Greeting Whereas in and by an Act of General Assembly of the said Province passed in the twenty fifth year of the Reign of our late Sovereign Lord the Second Intituled "An Act for Erecting the North West part of Bucks into a separate County" which in and by the said Act is called Northampton and John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse or any of them are appointed Trustees to purchase and take Assurance to them and their Heirs of a Piece of Land situate in some convenient Place in the Town of Easton in the said County and thereon to erect and build a Court House & Prison sufficient to accomodate the public Service of the said County as by the said Act appears And whereas in Pursuance of a Warrant dated the ninth of July 1762 under the Seal of our Land Office we have at the special Instance & Request of the said Trustees caused a Lot of Ground situate in the Center of the said Town of Easton to be laid out for a Court House for the Public Use and Service of the said County (an other Lot of Ground in the said Town having been heretofore laid out for a Prison or Common Goal erected thereon) which said lot in the Center Square contains in Length North and South eighty feet and in Breadth East and West eighty feet As by the said Warrant and Survey of the said Lot remaining in the Surveyor Generals Office and from thence Certified into our Secretarys Office more fully appears Now know ye that for the further Encouragement and better promoting the Public Benefit and Service of the said Town and County And for and in Consideration of the yearly Quitrent herein after re-
(31) served | and of the Sum of Five Shillings to us in Hand paid by the said Trustees (The Receipt whereof is hereby acknowledged) We have given granted released and confirmed & by these Presents do give grant release and confirm unto the said Trustees John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse and their Heirs the said Lot of Ground situate in the Center of the Great Square in the said Town of Easton containing eighty feet in Length North & South and eighty feet in Breadth East and West Together with all Ways Waters Watercourses Liberties Easements Privileges Profits Commodities Advantages and Appurtenances thereunto belonging And the Reversions and Remainders thereof To have and to hold the said herein

before described Lot of Ground with the Appurtenances unto the said John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse their Heirs and Assigns for ever In Trust nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever To be holden of us our Heirs and Successors Proprietaries of Pennsylvania as of our Manor of Fermor in the County of Northampton aforesaid in free and common Soccage by Fealty only in Lieu of all other Services Yielding & Paying therefor yearly unto us, our Heirs and Successors, at the Town of Easton aforesaid at or upon the first day of March in every Year from the first day of March next one Red Rose for the same or Value thereof in Coin Current according as the Exchance shall then be between our said Province and the City of London to such Person or Persons as shall from Time to Time be appointed to receive the same And in Case of Nonpayment thereof within ninety days next after the same shall become due That then it shall and may be lawful for us our Heirs and Successors our and | their Receiver or Receivers into and (32)
upon the hereby granted Lot or Piece of Ground and Premises to Reenter and the same to hold and Possess until the said Quitrent and all arrears thereof Together with the Charges accruing by Means of such Nonpayment and Reentry be fully paid and discharged

Witness John Penn Esquire Lieutenant Governor of the said Province who by virtue of certain Powers and Authorities to him for this Purpose inter alia granted by the said Proprietaries hath hereunto set his Hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this twenty eighth day of September, in the Year of our Lord one thousand seven hundred and sixty four The Fourth year of the Reign of George the Third the King over Great Brittain &c And Forty seventh Year of the said Proprietaries Government

JOHN PENN [L. S.]

Recorded ye 17th Jany 1765.

In testimony that the within is a copy of a patent as recorded in Patent Book A. A. Volume 6, Page 115 remaining in the Department of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said Department to be affixed at Harrisburg this eighteenth day of February, A. D., 1888.

ISAAC B. BROWN,
*Deputy Secretary of Internal Affairs.*

[SEAL]

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EXHIBIT No. 5.

| | |
|---|---|
| WILLIAM STUART | U. S. Circuit Court. |
| *vs.* | Eastern Dist. of Penna. |
| THE CITY OF EASTON AND | April Sess., 1888. |
| THE COUNTY OF NORTHAMPTON. | No. |

2

(33) PLAINTIFF'S TITLE.

1681. Charter. Charles II. granting and confirming the Province of Pennsylvania to William Penn and his heirs.
5 Sm. L. 406, &c.

Note.

1718.

Aug. 30. William Penn died August 30, 1718, leaving to survive him by his wife, Hannah Callowhill, four children, John, Thomas, Margaret and Richard. Hannah and Dennis had died in infancy. (Gilpin's pedigree.)

1712.

May 27. Will William Penn. Wherein he devised (*inter alia*) all his lands in Penna. to his wife Hannah Penn *et al.* in trust to appoint and convey all his residuary real estate in America to and among his children by his then wife, in such proportions and for such estate as she should think fit.

Recorded in Philadelphia
Will Book, No. 1, p. 238, &c.

1725.

Jan. 7. Deed Poll whereby Hannah Penn in pursuance and execution of above power appointed the Province of Pennsylvania the testator's residuary estate as follows:

To her son John Penn 2-4
Thomas Penn 1-4
(34) Richard Penn 1-4

Recorded at Philadelphia in
Deed Book
G. W. R. 31, page 40.

1735.

June 24. Release. Samuel Preston and James Logan surviving Trustees under above Will to

John Penn 2-4
Thomas Penn 1-4
Richard Penn 1-4 of *inter alia* their interest in said Province.

Recorded at Philadelphia in
Deed Book F. 7, page 338, &c.

1732.

May 8. Agreement between John Penn, Thomas Penn and Richard Penn to devise their shares to the eldest son in tail male remainder to other sons in like manner; and if any die without issue male his share to go to the survivor or survivors and heirs as he should appoint, and if no appointment then to survivors and their heirs male.

Enrolled in Chancery, March 21, 1750.

In evidence in Penn *vs.* Ld. Baltimore, 1 Vesey Sr. 444, Articles, Wills and Deeds creating entail of Penna. 1, &c. 10 Am. Law Register N. S. 488.

Note.

1746.

Oct. 29. John Penn in whom was vested one-half of said Province died unmarried and without issue Oct. 29, 1746.

Gilpin's Pedigree.

1746. (35)

Oct. 24. Will John Penn wherein he devised his 2-4 of Pennsylvania etc., unto his brother Thomas Penn for life with remainder to his first and other sons in tail, remainder to his brother Richard Penn for life, remainder to his first and other sons in tail male, remainder to his brother Thomas Penn in tail general; with authority to every tenant for life or in tail for the time being to grant any estate however large.

Recorded at Philadelphia,
Will Book H. page 295.

Note. Whereupon the said Thomas Penn became seized of 3-4 of said Province as above.

1750.

Jan. 31. Agreement between Thomas Penn and Richard Penn whereby *inter alia*, they made the like power of sale in fee applicable to their respective fourths.

See 2 Yeates, 553 4
Articles, Wills, &c., creating Entail
of Penna. 37, &c.
10 Am. Law Register, N. S. 489.

1750.

Mar. 20. Agreement between Thomas Penn and Richard Penn, wherein *inter alia* they agreed that each might by Will Deed, settlement or otherwise despose of his 1-4 to all his own issue female, in preference to all or any female issue of the other party.

2 Yeates, 553, 555,
Articles &c., creating Entail 60 &c.

1771. (36)

Recited. Richard Penn inter-married with Hannah daughter of Richard Lardner, M. D., and died in the year 1771, leaving to survive him 2 sons, John and Richard, and one daughter Hannah. His third son William died in his life time unmarried and without issue. 2 Yeates, 556.

1750.

Mar. 21. Will of Richard Penn wherein he devised his 1-4 of Pennsylvania &c., unto his son John Penn for life, remain-

der to his first and other son in tail male, remainder to his son Richard for life, remainder to his first and other sons in tail male, remainder to his son William for life, remainder to his first and other sons in tail male, remainder to his brother Thomas for life, remainder to his first and other sons in tail male, remainder to his sons successively in tail general, remainder to his daughter in tail male, and in tail general successively, remainder to his brother Thomas in tail general.

Duly Recorded in Prerogative Office at Burlington in Book XV of Wills Folio 357. Articles &c., creating Entail, 66. 10 Am. Law Reg. N. S. 489 &c.

As to 1-4 of Province belonging to Richard the elder.

1795. John Penn married Annie Allen, and died without issue in 1795.

Will duly proved at Philadelphia, Feb. 18, 1795. Recorded in Will Book X, 197, &c. 2 Yeates, 575.

(37) Note. Hannah Penn inter-married with James Clayton and died without issue.

Gilpin's Pedigree.
2 Yeates, 556.

Note. Whereupon said 1-4 vested in Richard Penn the younger.

Note.

1811. Richard Penn inter-married with Mary Masters and died in the year 1811, leaving issue four children Hannah, William, Richard and Mary. Admr. Book L. p. 244, at Phila.

Note. Hannah Penn died unmarried and without issue. Coleman's Pedigree, Gilpin's Pedigree. Article by Jno. Jay Smith delivered before the Hist. Soc. of Phila.

Note.

1862. Mary Penn inter-married with Samuel Paynter and died without issue in 1862.

See above Pedigrees.

Note. William Penn inter-married with Juliana Catharine and died in 1846, unmarried and without issue.

Gilpin's Pedigree.

Note. Richard Penn died April 27, 1863 without issue. Letters of Administration taken out in Philadelphia, Nov. 13, 1863. See Admr. Book L. 105, c. t. a.

Note. Whereupon the 1-4 interest in the Province vested in the descendants in tail general or Richard Penn the elder became vested in the descendants of Thomas Penn

and from this time on the whole interest of John, Thomas and | Richard Penn became vested in the (38)
descendants of Thomas Penn.

As to the various interests in the Province vested in the descendants of Thomas Penn.

Note.

1751. Thomas Penn inter-married with Lady Juliana Farmor.

1751.

Aug. 15. Marriage settlement between Thomas Penn and Lady Juliana Farmor wherein he conveyed his fourth of said Province to his own use for life, remainder to his first and other sons in tail male successively, remainder to his brother Richard for life, remainder to his first and other sons in tail male successively, remainder to the heirs of the body of him the said grantor, with power of sale in the holder of the title.

Acknowledged in Phila. July 11, 1829. Recorded July 22, 1829, in Deed Book G. W. R. No. 31, page 53, &c.

Note.

1775.

Mar. 21. Thomas Penn died March 21, 1775, leaving to survive him Juliana Penn, John Penn, Granville Penn and Sophia Margaret Penn, he had four other children who died minors | namely, William Penn, Louisa Penn, Thomas Penn and (39)
William Penn (two of the same name).

Gilpin's Pedigree.

1771.

Nov. 18. Will of Thomas Penn wherein he did devise *inter alia* as follows: "My late brother's moiety of the Province of Pennsylvania and of the three lower Counties of New Castle, Kent and Sussex upon Delaware in America being already settled in and by his last Will and Testament and my own quarter part of the same Province and the three lower Counties being by me settled in consideration of a marriage which was then intended and which hath been since had between me and my said dear wife, Lady Juliana, and some provision being already made in some cases for my widow and some of my children in and by certain family deeds of agreement entered into and executed by and between my late brothers and myself or by and between some of us I do hereby give, bequeath, devise and dispose of all the other parts of my real estate, etc."

Proved at Philadelphia, April 6, 1829, and recorded in Will Book 2, p. 154, &c.

Note. Juliana Penn inter-married with William Baker and died leaving to survive her, one daughter

Juliana Baker, who inter married with J. F. Rawlings and died without issue.

Gilpin's Pedigree.
10 Am. Law Reg. N. S. p. 491.

(40) 1834.

June 21. John Penn, called John Penn of Stoke Pogis died June 21, 1834, without issue.

See Will Book No. 11, p. 667 &c., at Phila. for his Will.
Gilpin's Pedigree.

1844.

Sep. 28. Granville Penn intermarried with Isabella, daughter of General Forbes and died September 28, 1844 leaving to survive him three sons, Granville John Penn, Thomas Gordon Penn and William Penn: he had by his wife nine children, six of whom however, died before him, to wit: Juliana Margaret who died a minor unmarried and without issue in 1804; Sophia who intermarried with William Gomm and died without issue in 1827: Louisa Emily who died unmarried and without issue in May, 1842, and Isabella Mary, Henrietta Anne and John William all of whom died minors unmarried and without issue.

Gilpin's Pedigree.
Will of Granville Penn, recorded at Phila. in Will Book No. 29, p. 384, &c.

Note. Children of Granville Penn entitled to his 3-4 interest.

Note.

1848.

Jan. 4. William Penn, son of Granville Penn died unmarried and without issue, January 4, 1848.

Gilpin's Pedigree.

Note.

1867.

Mar. 29. Granville John Penn son of Granville Penn died unmarried and without issue, March 1867. Who paid the last visit of the Penns to Penna., in June 1852.

(41) Will recorded at Philadelphia in Will Book 63, page 234 &c. Letter of administration upon his estate recorded in Adminr. Book T, page 173, &c. Gilpin's Pedigree.

Note.

1869.

Sep. 10. Thomas Gordon Penn son of Granville Penn died unmarried and without issue September 10, 1869, and with him terminated the estate tail male created under the agreements and wills of John, Thomas and Richard Penn sons of William Penn and Proprietaries of Penna.

Note. Whereupon the said Province or interest therein vested in descendants of Thomas Penn in tail general.

1847.

April. Sophia Margaret Penn, daughter of Thomas Penn intermarried with William Stuart, Archbishop of Armagh, and died in April, 1847, leaving to survive her four children

Note. William and Mary, Juliana, Henry and Louisa.

Gilpin's Pedigree.
10 Am. Law Reg. N. S. 491.

Note.

1823. Louisa Stuart daughter of Sophia Margaret Penn died unmarried and without issue in the year 1823.

Gilpin's Pedigree.

Note.

1854.

Oct. 26. Henry Stuart, son of Sophia Margaret Penn, died unmarried and without issue, October 26, 1854.

Gilpin's Pedigree.

Note. (42)

1866.

July 11. Mary Juliana Stuart, daughter of Sophia Margaret Penn intermarried with Thomas Viscount Northland now the Earl of Ranfurly, and died July 11, 1866, leaving to survive her nine children.

Gilpin's Pedigree.

Note. Upon the death of Thomas Gordon Penn in 1869, the remainder in tail general of the estate of the Penns in Pennsylvania vested in William Stuart, oldest son of Sophia Margaret Penn daughter of Thomas Penn; the various private estates in land in Pennsylvania also vested in the said William Stuart under Act April 27, 1855, representation being only allowed as far as children of uncles and aunts and Mary Juliana had died in 1866 before the remainder was cast.

See opinion Wharton & Rawle to Penns, June 1, 1875: also Act 1855.

1870. Deed William Stuart heir in tail of John Penn the elder, John Penn the younger, Thomas Penn and Richard Penn to Levi Bull in fee for all and singular the lands, tenements and hereditaments in the State of Pennsylvania whereof the said party is or of right ought to be seized as tenant in tail. In trust to reconvey the same to the party of the first in absolute fee simple.

Acknowledged before the United States Consul General at London, Aug. 5, 1870. En-

tered on records of Court of Common Pleas Phila. County and presented in the Court September 24, 1870, recorded in Book 29, page 322. Entered at Pittsburg as above Oct. 17, 1870. Book K, Pages 2, 3, 4 & 5. Recorded at Philadelphia, Deed Book J. O. H. 98, page 309, &c.

1870.

Sep. 2. Deed Levi Bull to William Stuart in fee in pursuance of the purpose of barring the entail in Penna. Acknowledged same day. Recorded Dec. 22, 1870 in Deed Book J. O. H. No. 98, Page 311, &c.

(43)

Note.

1874.

July 7. William Stuart intermarried with Henrietta daughter of Admiral Sir Charles Pole and died July 7, 1874, leaving to survive him several children, the oldest named William.

1854. Will William Stuart wherein he devised as follows: "I give devise and bequeath all my real estate over which I have any power of disposition and all my personal estate and effects whatsoever and wheresoever to my eldest son, William Stuart, his heirs, executors, administrators and assigns absolutely."

Duly proved at London, September 26, 1874, and recorded in Philadelphia December 28, 1876, in Will Book No. 88, 367, &c.

The plaintiff in the present suit is the above mentioned William Stuart, of London, England, and has vested in him all rights of the Proprietaries of Penna. both under the entail and the Will of his father who barred it.

It is agreed between the Counsel in above cause that the facts set forth in plaintiff title are true, the legal effect to be determined by the Court. Plaintiff to produce copies if required of all papers (not certified) referred to in said title.

(Signed) H. S. CAVANAUGH,
*Attorney for Comm's of Northampton County.*

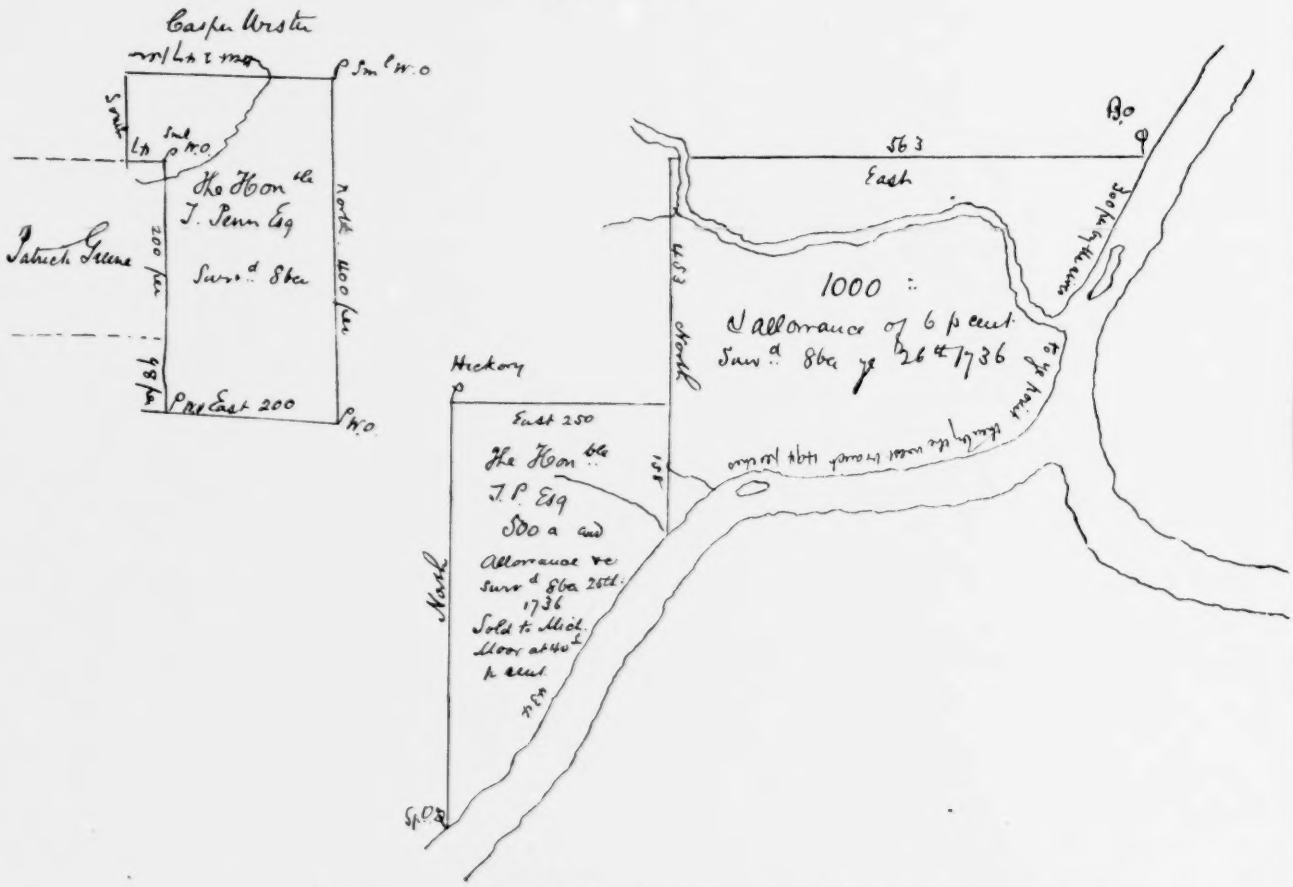
(44)

(Signed) AARON GOLDSMITH,
*Atty for the City.*

(Signed) C. B. TAYLOR,
*Atty for Plaintiff.*

FOLDOUTS TOO LARGE TO BE FILMED

EXHIBIT No. 7.




IN TESTIMONY, That the above is a copy of the original remaining on file in the Department of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the seal of the said Department to be affixed, at Harrisburg, the twenty-third day of September, 1889.

[SEAL]

ISAAC B. BROWN,
*Deputy Secretary of Internal Affairs.*

EXHIBIT No. 6. (46)

| | | |
|---|---|---|
| STUART | ( | U. S. C. C. East. Dist. Pa. |
| *vs.* | | April Sess., 1888. |
| EASTON. | ( | No. 51. |

And now to wit October 7th, 1889, it is agreed by and between Counsel in the above cause that the following facts are true, the admissibility as evidence and the legal affect thereof to be determined by the Court, to wit:

1. That the property the subject of the above suit is of greater value than $5,000.

2. That the Northampton County Court House was erected upon said property between the years 1763 and 1766 and remained upon the lot from that time until 1862 in which year it was removed and no other buildings have been erected thereon since.

3. That upon July 25, 1888 at 11 o'clock A. M. in the presence of H. S. Cavanaugh, Attorney for the County Commissioners of Northampton County, C. N. Andrews, Aaron Goldsmith, City Solicitor of the City of Easton, Chas. F. Chidsey, Mayor of said City and Geo. D. Morrel; C. B. Taylor Attorney for the present Plaintiff entered upon the above property and took possession of the said lot for the Plaintiff as heir and successor to Thomas and Richard Penn former Proprietaries of Pennsylvania, for the breach of the condition under which the lot had been granted by Patent from them dated Sept. 28, 1763, recorded July 17, 1765 in Patent Book A. A. Vol. 6 P. 115 and to revest the land in him as of the Original estate of said Patentors. And that thereupon the Representatives of the County of Northampton and the City of Easton the defts. here jointly outsed the said C. B. Taylor.

4. That the Letter Books of the Penns at the Historical Society in Phila.: containing letters, and instructions to commissioners and | surveyors as to laying out the Town of Easton be admitted. (47)

| | | |
|---|---|---|
| C. B. TAYLOR, | H. J. STEELE, | H. S. CAVANAUGH, |
| *Atty. for Plff.* | *Solicitor for City of Easton.* | *Atty. for Co. of Northampton.* |

(49) EXHIBIT No. 8.

Among the Records and Proceedings of the Department of Internal Affairs of Pennsylvania, *inter alia*, it is thus contained:

x x x x x x x x x x x x x x x x x x x x

47 { Honble. Tho. Penn Esq., Dft. of 1000[a] & 500[a] in the Forks of Delawe. in the handwriting of Benjamin Eastburn Also another Tract & not mentioned.

x x x x x x x x x x x x x x x x x x x x

In Testimony, That the above is an extract from the book of Proprietary Rights of Northampton County recorded on page No. 91 remaining on file in the Department of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said Department to be affixed, at Harrisburg, this Twenty-seventh day of September A. D. 1889.

(SEAL.)

ISAAC B. BROWN,
*Deputy Secretary of Internal Affairs.*

FOLDOUTS TOO LARGE TO BE FILMED

## EXHIBIT No. 10. (51)

| | | | |
|---|---|---|---|
| No. | 102 | Proprietaries | 535$^{a}$. Draft on Del. R. below the Foul rife. |
| | 103 | Joseph Owns | Mem$^{r}$ of a lease agreed to be given him of 500 of land at Shehocking. |
| | 104 | Henry Roan Junr | 80$^{a}$ 72$^{ps}$ Dft. part of an appropd. Tract of the Honble. Thos. Penn, Esq. |
| | 105 | Henry Kramer | 91$^{a}$ 15$^{p}$ Dft. part of Ditto. |
| | 106 | Conard Fox | 110: 132 Dft. part of Ditto. |
| | 107 | Sebastian Unangst | 83$^{a}$ 153$^{ps}$ Dft. pt. Ditto. |
| | 108 | Ditto | 59, 1 1/2$^{a}$ Dft. . . Do. |
| | 109 | John Devalt | 84$^{a}$ 27$^{p}$ Dft. . . . . Do. |
| | 110 | Jno. Anderson | 67$^{a}$ 95$^{p}$ Dft. part of Props. Dry land No. 193 in Sculls GenL. Dft. |
| | 111 | Lewis Gordon, Esq., | 210$^{a}$ 107$^{ps}$ part of ditto no. 194. |
| | 112 | Plan of Easton. | |
| | 113 | Ditto. | |
| | 114 | Ditto. | |

In Testimony, That the above is a copy of page (101) one hundred and one of a book designated as "Proprietary Rights" remaining on file in the Department of Internal Affairs of Pennsylvania. I have hereunto set my hand and caused the seal of said Department to be affixed, at Harrisburg, this Fifth day of October A. D. 1889.

(SEAL.)

THOS. J. STEWART,
*Secretary of Internal Affairs.*

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## EXHIBIT No. 11. (52)

Thomas Penn & Richard Penn, Esquires true and absolute Proprietaries and Governors in Chief of the Province of Pennsylvania, and Counties of Nescastle, Kent & Sussex on Delaware.

To all unto whom these presents shall come greeting:

Whereas, In and by an Act of General Assembly of this Province Intitled An act for erecting the North West part of Bucks into a separate County which in and by the said Act is called Northampton Thomas Craig, High Wilson, John Jones, Thomas Armstrong and James Martin or any three of them were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the said County In trust and for the use of the inhabitants of the said County and thereon to erect and

build a Court House and Prison sufficient to accommodate the public service of the said County and for the ease and convenience of the inhabitants as in and by the said Act appears. AND WHEREAS On the application and request of the said Trustees and out of our regard to encourage and promote the Improvement of the said Town and general good and convenience of the inhabitants of the said County we have condescended and agreed to grant unto the said Trustees a lot or piece of ground (No. 96) in the said Town for a prison of the dimensions of two hundred and forty feet in length by sixty in breadth Bounded Northward by a twenty feet alley Eastward by another twenty feet alley Southward by lot number ninety-eight and Westward with Pomfret street. AND WHEREAS We did issue our warrant bearing date 9th day of July last under the seal of our Land Office requiring our surveyor General to make return of the said lot into our Secretarys Governor in order for confirmation to the said trustees for the public use aforesaid which hath been accordingly done as by the said warrant & Survey remaining in the
(53) Surveyor General's Office and from thence certified into | our Secretaries Office more fully appears Now know ye that for and in consideration of the sum of five shillings to our use paid by the said Trustees (the receipt whereof is hereby acknowledge) and of the yearly quitrent hereinafter mentioned and reserved We have given, granted, released and confirmed and by these presents for us our Heirs and successors Do give grant release and confirm unto them the said Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin their heirs and assigns the said lot or piece of ground as the same is hereinbefore mentioned With all ways waters watercourses Easements Improvements and all other rights liberties Privileges Advantages Hereditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining. To have and to hold the said lot or piece of ground and premises thereby granted with the appurtenances unto the said Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martinand their Heirs and Assigns. To the only use and behoof of them the said Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin their heirs and assigns forever. In trust and for the use of the inhabitants of the said County and thereon to erect an common Goal or Prison sufficient to accommodate the public service of the said County and to and for no other use whatsoever. To be holden of us our heirs and successors Proprietaries of Pennsylvania as of our Manor of Fernot in the County of Northampton aforesaid in free and common socage by fealty only in lieu of all other services. Yielding and paying therefor yearly unto us our heirs and successors at the Town of Easton in the said County at or upon the first day of March in every year from the first day of March last One Red Rose to such person or persons as shall from time to time be appointed to receive the same. Witness James Hamilton, Esquire Lieutenant Gover-
(54) nor of the said Province who by virtue of certain power and | authorities to him for this purpose (inter alia) granted by the said Proprietaries hath hereunto set his hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this Eighteenth day of January in the year of Our Lord one thousand seven hundred and sixty-three. The

third year of the reign of King George the Third over Great Britian &c. And the forty-fifth year of the said Proprietaries Government.

JAMES HAMILTON. (L. S.)

Recorded ye 10th February 1763.

In Testimony, That the forgoing is a copy of a Patent as recorded in Patent Book "A. A." No. 4 Page 220 remaining in the Department of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the Seal of said Department to be affixed at Harrisburg, this Second day of October A. D. 1889.

[SEAL.]

ISAAC B. BROWN,
*Deputy Secretary of Internal Affairs.*

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## EXHIBIT No. 12. (55)

### Deed.

Granville John Penn
& Richard Penn
to
County of Northampton.

This Indenture made the twenty-fourth day of September in the Year of our Lord one thousand eight hundred and fifty two Between Granville John Penn of Stoke Park in the Parrish of Stoke Pages in the County of Bucks in England Esquire by his Attorney George Cadwallader of the city of Philadelphia Esquire by letter of Attorney duly constituted which Letter of Attorney is dated the eighteenth day of September in the year of Our Lord One thousand eight hundred and forty-six recorded at Easton in the County of Northampton In Letter of Attorney Book No. Page And Richard Penn (3) of Whitehall in the city of Westminster in England Esquire by his Attorney Benjamin Rush of the City of Philadelphia Esquire by Letter of Attorney duly constituted which Letter of Attorney is dated the twelfth day of December in the year of Our Lord One thousand Eight hundred and fifty and recorded at Easton aforesaid in Letter of Attorney Book No. Page of the one part and the County of Northampton in the Commonwealth of Pennsylvania of the other part Whereas Thomas Penn and Richard Penn late Proprietaries and Governors in chief of the Province of Pennsylvania by James Hamilton Lieutenant Governor of the said Province by them duly constituted for that purpose did by Patent under the Great Seal dated the eighteenth day of January in the year of Our Lord one thousand seven hundred and sixty-three and recorded in the City of Philadelphia in Patent Book A.A. Vol. 4 P 220 &c. Grant and convey unto | Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong (56) and James Martin Trustees appointed by Act of Assembly to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the County of Northampton aforesaid, and thereon to erect and build a Court House and

Prison sufficient to accommodate the public service of the said County a lot or piece of ground (96) in the said Town for a Prison of the dimensions of two hundred and forty feet in length by sixty feet in breadth bounded northward by a twenty feet wide alley Eastward by another twenty feet wide alley southward by lot No. 98 and Westward with Pomfret Street In trust and for the use of the inhabitants of the said County and thereon to erect a common goal or Prison sufficient to accommodate the public service of the County and to and for no other use whatsoever AND WHEREAS the said County of Northampton is desirous of becoming the owners of the said lot of ground with the appurtenances in fee simple to be by them occupied and enjoyed for all and every purpose whatsoever they may deem proper and at pleasure to sell and convey the same free and clear from all and every restriction incumbrance and estate whatever NOW THIS INDENTURE WITNESSETH THAT THE SAID Granville John Penn and Richard Penn in whom the reversionary estate in the said lot of ground by force and in virtue of divers devises and conveyances in the law duly had and executed is now vested for and in consideration of the sum of five hundred dollars to them in hand paid by the said County of Northampton the receipt whereof is hereby acknowledged and the said County of Northampton forever thereof and discharged by these presents have granted bargained sold enfeoffed released and confirmed and by these presents do grant bargain sell enfeoffed release and confirm unto the said The County of Northampton their
(57) successors and assigns all right title interest estate property | claim and demand whatsoever which they the said Granville John Penn and Richard Penn or either of them their or either of their heirs executors or administrators have or might have of in to or out of the said described lot or piece of ground with the appurtenances To Have AND To HOLD the same unto the said County of Northampton their successors and assigns to and for the only proper use benefit and behoof of the said County of Northampton their successors and assigns forever In Witness whereof the said Parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

Sealed and delivered in the presence of
John Thompson &
David F. Foley

Granville John Penn [SEAL]
by his attorney
Geo. Cadwallader [SEAL]
Richard Penn [SEAL]
by his attorney
Benj. Rush [SEAL]

Received on the day of the date of the above written Indenture of and from the above named The County of Northampton the sum of five hundred dollars in full of the consideration before mentioned.

Geo. Cadwallader Attorney for
Granville John Penn

Benj. Rush Attorney for
Richard Penn.

On the 25th day of September A.D. 1852 before me the subscriber and alderman in and for the City of Philadelphia personally appeared George Cadwallader in the foregoing indenture named and in due form of law acknowledged the same to be his own act and deed as well as the act and deed of his constituent the said Granville John Penn and desired the same to be taken and recorded as such according to law. Witness my hand and Seal John Thompson Ald. [SEAL]

On the 25th day of September A D. 1852 before me the subscriber (58)
and Alderman in and for the City of Philadelphia personally appeared Benjamin Rush in the foregoing Indenture named and in Due form of law acknowledged the same to be his act and deed as well as well as the act and deed of his said Constituent the said Richard Penn and desired the same might be taken and recorded as such according to law. Witness my hand seal

JOHN THOMPSON Ald. [SEAL]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF NORTHAMPTON } *ss*

I GEORGE R. HESS Recorder of Deeds &c. in and for the said County aforesaid do hereby certify that the above and foregoing is a true and correct copy of the Deed Recorded in Deed Book F. Vol. 8 Page 226 &c. so full and entire as the same remains of record in my said Office IN TESTIMONY, where I have hereunto set my hand and affixed the seal of my said office at Easton this second day of October A. D. 1889.

GEORGE R. HESS
*Recorder*

per SAM. S. YOHE [SEAL]
*Deputy*

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## EXHIBIT No. 13. (59)

DEED

MESSR. PENN
*To*
PETER SCHNYDER *et al*

This Indenture made the twenty-third day of June in the year of Our Lord One thousand eight hundred and two BETWEEN the Honorable John Penn of stoke Pages in the County of Bucks in the Kingdom of Great Britain Esquire one of the late Proprietaries of Pennsylvania and of the three lower counties of Nescastle, Kent and Sussex now the Delaware state and the Honorable Richard Penn of Queen Ann Street West in the

Parrish of St. Mary le Bone in the County of Middlesex in the Kingdom of Great Britian aforesaid Esquire brother of the 1st John Penn who was the other of the late Proprietaries of Pennsylvania and of the three lower Counties now state of Delaware aforesaid by John R. Coates of the City of Philadelphia in the State of Pennsylvania Esquire their Attorney duly constituted and authorized by Letter of Attorney under the hands and Seals of the said John Penn and Richard Penn legally executed bearing date 27th day of November 1800 intended to be recorded of the one part AND Peter Snyder, Nicholas Droxell and Nicholas Kern of the Town of Easton Trustees for the German Reformed Congregation in and near the Town of Easton aforesaid and Jacob Weygandt William Roup and Conard Bettenbender of the said Town of Easton Trustees of the German Lutheran Congregation in and near the Town of Easton aforesaid of the other part.

WITNESSETH THAT the said John Penn and Richard Penn by their said Attorney for and in consideration of the sum of Ten dollars lawful money of the United States unto the said Jacob R. Coates for the
(60) use | of his constituents by the said parties of the second part well and truly paid at the execution hereof the receipt whereof is hereby acknowledged have granted bargained and sold aliened released and confirmed and by these presents grant bargain and sell release and confirm unto the said Peter Schnyder Nicholas Droxell and Nicholas Kern Jacob Waygandt William Roup and Conard Bittenbender and to the their heirs and assigns Three certain lots or pieces of ground situate in the Town of Easton in the Borough of Easton in the County of Northampton one of them situated on the East side of Pemfret Street being the two contiguous lots named in the general plan of the said Town No. 70 and 72 containing in breadth together one hundred and ten feet and in length or depth two hundred and forty feet bounded southward by a twenty feet wide alley eastward by another twenty feet wide alley Northward by lot No. 68 and westward by Pomfret Street aforesaid (on which lots the said congregation have erected a church and a school house) Another of them situate on the east side of Ferry Street being the two contiguous lots marked in the general plan of the said Town of Easton No. 179 and No. 180. containing in breadth together on the said Ferry Street one hundred and ten feet and in length or depth two hundred and twenty feet Bounded eastward by lot No. 178 southward by a twenty feet wide alley westward by Hamilton Street and northward by Ferry Street aforesaid And the other of them situate on the east side of John Street Containing in breadth east and west three hundred and fourteen feet and in length or depth north and south two hundred and seventy-five feet Bounded eastward by Juliana street Southwardly by a twenty feet wide alley and westward by John street aforesaid together with all and singular the ways waters and watercourses rights liberties and privileges hereditaments and appurtenances what soever thereunto belonging or in any wise appertaining and the reversions and remainders rents dues and profits |
(61) thereof and all the estate right title and interest property claim and demand whatsoever of them the said John Penn and Richard Penn

respectively in law equity or otherwise howsoever of in and to the same To Have and To Hold all and singular the premises heerby granted with the apputenances unto the said Peter Snyder Nicholas Droxell Nicholas Kern Jecob Waygandt William Roup and Conard Bittenbender their heirs and assigns forever In trust nevertheless as for and concerning the first above described lot of ground as a site for the Church or House of Religious Worship and school house erected thereon and such other buildings as may be deemed necessary for the conveniency of the said Congregation and as for and concerning the two last above described lots of ground as burial places for the use of the German Reformed and German Lutheran Congregations in and near the Town of Easton aforesaid and in confidence that the said Peter Snyder Nicholas Droxell Nicholas Kern Jacob Waygandt William Roup and Conard Bettenbender and the survivors and survivor of them their and his heirs and assigns do and shall permit and suffer all and singular the premises hereby granted and every part thereof and the building thereon erected to be at all times forever at the disposal and under the care regulation and management of the said German Reformed and German Lutheran Congregations in and near the Town of Easton aforesaid or under the care regulation and management of the Trustees elders and Church Wardens of the said Religious Societies for the time being or a majority of them and to and for no other use purposenwhatsoever and the said John Penn and Richard Penn for them selves their heirs executors and administrators respectively do by their said attorney covenant promise and agree to and with Peter Schnyder Nicholas Droxell Nicholas Kern Jacob Waygandt William Roup and Coned Bittenbender their heirs and assigns by these presents that they | the said John Penn and Richard Penn and (62)
their heirs respectively all and singular the premises hereby granted with the appurtenances unto the said Peter Schnyder Nicholas Droxell Nicholas Kern Jacob Waygandt William Roup and Conard Bittenbender their heirs and assigns in trust for the uses aforesaid against them the said John Penn and Richard Penn and their heirs respectively and against all and every other person or persons whatsoever lawfully claiming or to claim by from or under them or any or either of them shall and will Warrant and forever defend by these presents IN WITNESS the said parties have hereunto interchangeably set their hands and seals Dated the day and year first above written.

Sealed and delivered in the presence of us
FREDK. BEATES PHILIP
T. DUNN.

JOHN PENN [SEAL]
RICHARD PENN [SEAL]
by their attorney
JOHN R. COATES [SEAL]

Received the day of the date of the above written Indenture of the above named PetermSchnyder Nicholas Droxell Nicholas Kern Jacob

Waygandt William Roup and Conard Bettenbender the sum of tendollar being the full consideration money above ment ioned for the Honorable John Penn and Richard Penn Esquires.
Witness

FREDK. BEATES JOHN R. COATES

The twenty-third day of June A. D. 1802 before me the subscriber Mayor of the City of Philadelphi a came the above named John R. Coates and in his own name and in the name of his constituents the above named John Penn and Richard Penn in due form of law acknowledge the above written Indentur to be his own act and deed of his said constituents by the said JohnR. Coates done and executed by virtue of a letter of Attor-
(63) ney to him for that purpose granted and | and desired the same might be recorded as such. Witness ny hand and seal the day and year aforesaid.

MAT. LAWLER Mayor [SEAL]

Recorded the 20th Sept. 1802.

COMMONWEALTH OF PENNSYLVANIA )
COUNTY OF NORTHAMPTON ) ss

I George Hess Recorder of Deeds &c. in and for said County do hereby certify that the above and foregoing is a true and correct copy of the Deed recorded in Deed Book G. Vol. 2 Page 402 &c. so full and entire as the same remains of record in my said office IN testimony whereof I havehereunto set my hand and affixed the seal of my said office at Easton this 2nd day of October A. D. 1889.

GEORGE R. HESS
*Recorder.*

[SEAL] Per SAM. S. YOHE *Deputy.*

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(64) EXHIBIT No. 14.

THIS IS TO CERTIFY,

*First*, That the records of the Department of Internal Affairs of Pennsylvania show that a number of warrants were issued for lots in the town of Easton, Pennsylvania: that the surveys were made in pursuance thereof, and that the patents were granted for said lots by the *Proprietaries of the Province of Pennsylvania.*

*Second*, That a thorough search has been made among the records of the Department, but no evidence can be found to indicate that any warrants were issued, any surveys made, or any patents granted by the *Commonwealth of Pennsylvania* for any lots in the town of Easton, Pennsylvania.

IN WITNESS WHEREOF, I have hereunto set my hand, caused the seal of said Department to be affixed at Harrisburg, this third day of October, A. D. 1889.

ISAAC B. BROWN,
[SEAL.] *Deputy Secretary of Internal Affairs.*

## EXHIBIT No. 15. (65)

STUART vs. EASTON. United States Circuit Court. April Sessions, 1888. No. 51.

And now to wit the 3rd. day of April A. D. 1895, it is agreed be and between counsel in the above cause as follows:

That William Stuart, the plaintiff above named, has since the commencement of the present suit departed this life, and that his son, William Dugald Stuart, an Alien and subject of the Queen of Great Britain resident in England, has become entitled to all the rights of the said William Stuart in Pennsylvania, and that therefore it is agreed that his name shall be substituted upon the record in the place of the said William Stuart.

It is further agreed that the said William Dugald Stuart, and William Stuart and his father William Stuart, Thomas Gordon Penn, Granville John Penn and Richard Penn successors in estate to Richard and Thomas Penn, Proprietaries of Pennsylvania since 1850 have been each and all of them aliens and subjects of the Queen of Great Britain resident in England.

That the City of Easton and County of Northampton are corporations incorporated under the laws of the State of Pennsylvania and citizens of the said State resident in the Eastern District of Pennsylvania.

C. B. TAYLOR,
*Att'y for Wm. Dugald Stuart.*
H. J. STEELE.
*Att'y for the City of Easton.*

And thereupon the counsel for the said plaintiff did then and there (66) except to the aforesaid charge and opinion of the said court, and in as much as the said charge and opinion: so excepted to, do not appear upon the record:

The said Counsel for the said Plaintiff did then and there tender this bill of exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the Statute in such case made and provided, and thereupon the aforesaid Judge at the request of the said Counsel for the Plaintiff did put his seal to this bill of Exceptions, pursuant to the aforesaid Statute in such case made and provided, this 19th day of April A. D. 1895.

Signed, GEO. M. DALLAS, [SEAL]
*Cir. J.*

Endorsed: U. S. C. C. Eastern Dist. of Penna. 51. Apl. Sess. '88. Stuart *v.* Easton. Bill of Exceptions. Presented Apl. 13, 1895. G. M. D. C. B. Taylor, A. T. Freedley, Wm. Brooke Rawle. Filed April 20, 1895.

(67) STUART vs. EASTON. | C. C. U. S. Eastern Dist. Pa. April Sess., 1888. No. 51.

The above plaintiff believing himself to be aggrieved by the final judgment entered against him on the 6th day of April, 1895, in the above cause, hereby prays for a writ of error to the United States Circuit Court of Appeals, 3rd Circuit, and that a transcript of the record and proceedings and papers on which said final judgment was entered duly authenticated may be sent to the United States Circuit Court of Appeals, 3rd Circuit.

C. B. TAYLOR,
A. T. FREEDLY,
WM. BROOKS RAWLE,
*Attorneys for Plaintiffs.*

Allowed May 3, 1895.
GEO. M. DALLAS,
*Cir. J.*

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(68) WILLIAM DUGALD STUART, an alien, &c.

*vs.*

THE CITY OF EASTON AND COUNTY OF NORTHAMPTON, citizens of Pennsylvania, &c.

## ASSIGNMENTS OF ERROR.

*First:*—The learned Judge below erred in instructing the jury to find a verdict for the defendant.

*Second:*—The learned Judge erred in instructing the jury as follows: "I therefore instruct you that such is the effect of the conveyance, and the plaintiff is not entitled to maintain this action and your verdict should therefore be for the defendant."

*Third:*—The learned Court below erred in not instructing the jury that the effect of the patent of the 28th September, 1764, was to create a conditional estate in the grantees therein and those claiming under them.

*Fourth:*—The learned Court below erred in refusing to admit in evidence plaintiff's Exhibit No. 11 (printed Record, page ) being deed Thomas and Richard Penn, proprietaries of Pennsylvania, to Thomas Craig, *et al.*, for the prison lot in the town of Easton, dated 18th January,

1763. Recorded February 10th, 1763, in Patent Book A. A., No. 4, page 220, &c.

*Fifth*:—The learned Court below erred in refusing to admit in evi- (69)
dence plaintiff's Exhibit No. 12 (printed Record, page 25) being deed Granville John Penn and Richard Penn, proprietaries of Pennsylvania, to county of Northampton, for the conditional estate of the said proprietaries in the prison lot in the town of Easton, dated 24th September, 1852, recorded at Easton in Deed Book F., Vol. VIII, page 226, &c.

*Sixth*:—The learned Court erred in refusing to admit in evidence plaintiff's Exhibit No. 13 (printed Record, page 27) being deed John Penn and Richard Penn, proprietaries of Pennsylvania, to Peter Snyder, *et al.*, for lots Nos. 70 and 72, 179 and 180, in the town of Easton, dated June 25rd, 1802, recorded at Easton 20th September, 1802, in Deed Book G, Vol. 11, page 402, &c.

*Seventh*:—The learned Court below erred in refusing to admit in evidence plaintiff's Exhibit No. 14 (printed Record, page 30) being a certificate from the land office in Pennsylvania showing that no warrants, surveys, or patents had been issued by the Commonwealth of Pennsylvania for lots in the town of Easton, Pa.

*Know all men by these presents*, That we, William Dugald Stuart, by (70)
his Attorney in fact William Brooke Rawle (see letter of Attorney, Book No. 81, page 61, &c.), as principal, and Francis F. Eastlake, Jr. and The Land Title and Trust Company as sureties, are held and firmly bound unto the City of Easton and the County of Northampton in the full and just sum of five hundred dollars to be paid to the said the City of Easton and the County of Northampton, their certain attorneys, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-five (1895).

WHEREAS, lately at a term of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, in a suit depending in said Court, between said William Dugald Stuart, an alien or subject of the Queen of Great Britain residing in London, England *vs.* The City of Easton and the County of Northampton, corporations of the State of Pennsylvania, citizens of said State and residing in the Eastern District thereof, a judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

*Now, the condition of the above obligation is such*, That if the said William Dugald Stuart shall prosecute his writ to effect, and answer all

damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM DUGALD STUART, [SEAL.]
By his Attorney in fact.
WM. BROOKE RAWLE, [SEAL.]
FRANCIS F. EASTLAKE, JR., [SEAL.]

The Land Title and Trust Company,
Attest: WM. R. NICHOLSON.
[CORPORATE SEAL.] *President.*

Sealed and delivered in presence of
S. ROLLASON RAINNIE,
H. J. SHARP.

Approved by
GEO. M. DALLAS,
*Cir. J., May 10, 1895.*

ALBERT D. FELL,
[CORPORATE SEAL.] *Secretary.*

Endorsed: No. 51. April Sess., 1888. C. C. U. S. E. D. of Pa. William Dugald Stuart *vs.* The City of Easton, *et al.* Bond sur writ of error. Filed May 10, 1895.

SAMUEL BELL.
*Clerk C. C.*

(71) UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*

I, SAMUEL BELL, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the following to be a true and faithful copy of the original Pleas and Proceedings in the case of William Dugald Stuart *vs.* The City of Easton, *et al.* No. 51. April Session, 1888, on file and now remaining among the records of the said Court in my office.

*In testimony whereof*, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-fifth day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL] SAMUEL BELL,
*Clerk of C. C.*

39 U. S. Circuit Court of Appeals, Third Circuit.

And afterwards, to wit, on the twenty-third day of September, A. D. 1895, this cause being called for argument upon the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania and being argued by counsel for the respective parties, *and* the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the fourth day of June, A. D. 1896, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion, to wit:

40 In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM DUGALD STUART, an Alien and Subject of the Queen of Great Britain, Plaintiff in Error,

*v.*

THE CITY OF EASTON and THE COUNTY OF NORTHAMPTON, Corporations of the State — Pennsylvania, Defendants in Error.

Error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Shiras, circuit justice, and Acheson and Butler, JJ.

ACHESON, *Circuit Judge:*

This was an action of ejectment by William Dugald Stuart, an alien and subject of the Queen of Great Britain, against The City of Easton and County of Northampton, corporations of the State of Pennsylvania.

The county of Northampton was laid out and erected by an act of the General Assembly of the Province of Pennsylvania passed the 11th day of March, 1752 (1 Dallas' Laws, 452). The sixth section of the act provided as follows: "And be it further enacted, that it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong, and James Martin, or any three of them, to purchase and take assurance to them and their heirs, of a piece of land situate in some convenient place in the

41 said town (Easton), in trust and for the use of the inhabitants of the said county, and thereon to erect and build a court-house and prison, sufficient to accommodate the public service of the said county and for the ease and conveniency of the inhabitants."

On the 9th day of July, 1762, Thomas and Richard Penn, the proprietaries of Pennsylvania, caused to be issued a warrant of survey which, after reciting the above-mentioned act, proceeded thus: "And whereas on application and request of said trustees and out of regard to encourage and promote the improvement of

the said town and general good and convenience of the inhabitants of the said county we have condescended and agreed to grant to the said trustees a lot or piece of ground of eighty feet square, to be laid out in the center of the great square in the middle of the said town of Easton, for a court-house for the use and the accommodation of the inhabitants of the said town and county forever;" and the warrant then directed the surveyor general to survey and lay out the said described lot of ground "for the public use of a court-house for the inhabitants of the said town and county."

This warrant having been duly executed and returned into the land office, a patent was issued on the 28th day of September, 1764, by the proprietaries to the named trustees for said lot. After reciting the act of assembly and the warrant of survey, the patent proceeds thus: "Now, know ye, that for the further encouragement and better promoting the public benefit and service of the said town and county, and for and in consideration of the yearly quitrent (one red rose) hereinafter reserved and of the sum of five shillings to us in hand paid by the said trustees, the receipt whereof is hereby acknowledged, we have given, granted, released, and con-
42 firmed, and by these presents do give, grant, release, and confirm, unto the said trustees, John Jones, Thomas Armstrong, James Martin, John Rinker, and Henry Allshouse, and their heirs the said lot of ground situate in the center of the great square in the said town of Easton, containing eighty feet in length north and south and eighty feet in breadth east and west; * * * to have and to hold the said hereinbefore-described lot of ground, with the appurtenances, unto the said John Jones, Thomas Armstrong, James Martin, John Rinker, and Henry Allshouse, their heirs and assigns forever, in trust, nevertheless, to and for the erection thereon a court-house for the public use and service of the said county and to and for no other use, intent, or purpose whatsoever."

By virtue of an act of assembly approved April 15, 1834 (P. L., 538), the title of the trustees became vested in the county of Northampton.

The Northampton county court-house was erected upon the said lot of ground between the years 1763 and 1766 and remained upon the lot from that time until 1862, in which year it was removed, and no other buildings have been erected thereon since.

On the 25th day of July, 1888, William Stuart, who was the heir-at-law of Thomas and Richard Penn, caused an entry to be made on the said lot of ground for breach of the condition subject to which, it is alleged, the lot was granted by the above-recited patent, and subsequently he brought this action of ejectment for the recovery of the lot.

William Stuart having died after the commencement of the suit, his son, William Dugald Stuart, who succeeded to all the
43 rights of the said William Stuart in and to lands in Pennsylvania, was substituted as plaintiff.

Under the instructions of the court below there was a verdict for the defendants, and afterwards judgment was entered in their favor.

The position taken by the plaintiff in error is that the grant of

September 28, 1764, by Thomas and Richard Penn to John Jones and others, "their heirs and assigns forever, in trust, nevertheless, to and for the erecting thereon a court-house for the public use and service of the said county and to and for no other use, intent, or purpose whatsoever," did not pass an estate in fee-simple, but only a conditional estate, determinable on the cessation of the use of the lot of ground for the designated purpose. Is this a sound view of the conveyance?

It is to be observed that the deed from the Penns recites as the occasion of the grant the act of the General Assembly under which, as we have seen, John Jones and others were empowered "to purchase and take assurance to them and their heirs" of a piece of land "in trust and for the use of the inhabitants of the said county," and thereon to erect a court-house "for the ease and conveniency of the inhabitants." Undoubtedly, the act of assembly contemplated the acquisition of an estate in fee-simple only by the appointed trustees. Now, the conveyance by the Penns is to the named persons, "their heirs and assigns forever." The succeeding words, "in trust, nevertheless, to and for the erecting thereon a court-house for the public use and service of the said county, and to and for no other use, intent, or purposes whatsoever," define the relation between the grantees and the inhabitants of the
44 county of Northampton, and restrain the grantees from any other application of the property than to the avowed object of the grant. The words of the deed are apt words to pass a fee-simple estate as between the grantors and the grantees, and to create a trust as between the grantees and the beneficiaries. There is here no express provision for forfeiting the estate for non-user, nor is any right of re-entry expressly reserved to the grantors or their heirs in the event of the cessation of the use of the lot for the designated purpose. The object of the grant was the public benefit and service of a growing community throughout all future changes in the condition and circumstances of that community, and the purpose of the grant could be subserved best by the conveyance of an absolute estate. In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate determinable by re-entry upon non-user was intended?

In Wright *v.* Linn, 9 Pa., 433, where land was conveyed to certain named persons and their successors, in trust to erect a school-house for the perpetual use of the parties to the deed and other designated persons, it was held that a charity was created which was not determined by non-user for more than seventeen years after a school-house had been erected and used and a re-entry by the grantor. In McKissick *v.* Pickle, 16 Pa., 140, 148, the court declared: "The grant, being for a charity, could not be forfeited for non-user, nor for misuser, except under an express condition or contract;" and the court furthers said: "The law raises every intendment in favor of a charity against the grantor or those claiming under him." In Griffiths *v.* Cope, 17 Pa., 96, 99, in con-
45 struing a devise to charitable uses the court said: "Our law discourages the fettering of estates and putting them into

mortmain, and therefore favors the construction which relieves from restraints upon alienation, and it seems unreasonable to suppose that devisor ever means that his heirs shall get back the land in in such cases except when he says so. * * * It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied." In Barr *v.* Weld, 24 Pa., 84, 87, where a conveyance was "in trust for the Utica school house," the court said: "There is no express condition or contract giving to the grantor or his heirs the right to enter for condition broken or for misuser. He had, therefore, no right to maintain an ejectment, and the plaintiff claiming under him is in the same predicament." *In re* Mercer Home, 162 Pa., 232–238, where a testatrix devised a farm to a charitable use as a home for disabled clergymen and directed that no part thereof "shall be sold or disposed of, incumbered, or applied to any other use or purpose than as a home for disabled clergymen of the Presbyterian faith, as above specified," it was held that, as the testatrix created no remainder or reversion, the charity took an estate in fee-simple; that the heirs of the testatrix had no interest, direct or remote, in the property, and that nothing short of a plain, unequivocal direction that no part of the land should be parted with for any purpose whatsoever ought to be held sufficient to restrain the managers from doing that which the interest of the charity under their control required of them.

These decisions of the supreme court of Pennsylvania are conclusive, we think, against the claim of the plaintiff in error
46 if, as is contended by the defendants, the grant by the Penns was for a charitable use. To the question, then, whether the use designated in and by the deed of September 28, 1764, is of a charitable nature we now direct our attention.

Although the statute of 43 Eliz., ch. 4, concerning charitable uses, was not adopted by the colony or State of Pennsylvania, still the principles of it as applied by chancery in England always have obtained here by force of the common law of the State. Witman *v.* Lex, 17 Ser. & R., 88. This was clearly shown by Mr. Justice Baldwin (sitting at circuit in this State) in his learned opinion upon charitable uses in the case of Magill *v.* Brown, Brightly's R., 347, 16 Fed. Cas., 408, which arose under the will of Sarah Zane, wherein also he demonstrated that the whole course of the common law of England, except as modified for special purposes of policy by the statutes of mortmain and superstitious uses, was favorable to charities. And in Ould *v.* Washington Hospital for Foundlings, 95 U. S., 303, 309, 311, the Supreme Court of the United States declared that the statute of 43 Eliz., ch. 4, was purely remedial and ancillary, and that the validity of charitable endowments and the jurisdiction of courts of equity over them do not depend upon that statute.

Now, in Jones *v.* Williams, Amb., 651, Lord Camden defined a charity to be "a gift to a general public use which extends to the poor as well as the rich;" and a bequest of a fund to be applied to

water works for the use of the inhabitants of a town was there recognized as for charitable use. In House *v.* Chapman, 4 Ves., Jr., 542, 551, it was held that a bequest for the improvement of
47 the city of Bath was a charitable bequest. In British Museum *v.* White, 2 Sim. & S., 595, a devise to the British museum was adjudged to — for a charitable use. In Attorney General *v.* Heelis, 2 Sim. & S., 67, 76, where a part of a common was dedicated for paving, lighting, cleansing, and otherwise improving a town, the funds derived therefrom were held to constitute a charity, and the vice-chancellor (Sir John Leach), there said: "I am of opinion that funds supplied from the gift of the Crown or from the gift of the legislature, or from private gift for any legal, public, or general purpose, are charitable funds, to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute. Thus * * * a gift to build a sessions house for a county, a gift by Parliament * * * for the purpose of rebuilding St. Paul's church after the fire in London, have all been held to be charitable uses within the equity of the statute of Elizabeth."

These English cases are cited with approval in the opinion of the supreme court of Pennsylvania in Wright *v.* Linn, *supra*, and the deduction therefrom made "that every kind of legal public benefaction is included in the notion of charity."

In Coggeshall *v.* Pelton, 7 Johns. Ch., 292, a pecuniary legacy to the town of New Rochelle for the purpose of erecting a town-house for transacting town business was held to be a valid charitable bequest. In Magill *v.* Brown, *supra*, a bequest to a town for a fire-engine and hose was sustained as for a charitable use. These two latter cases were cited with approval in Cresson's Appeal, 30
48 Pa., 437, 450, wherein it was held that a legacy the income of which was to be "annually forever expended in planting and renewing shade trees, especially in situations now exposing my fellow-citizens to *be* the heat of the sun," and a legacy "to endow a professorship of the fine arts" in the University of Pennsylvania, were good bequests to charitable uses. The court there said: "Charity has been defined to be a general public use. Amb., 651."

In Fire Insurance Patrol *v.* Boyd, 120 Pa., 624, 644, 645, it was held that the Fire Insurance Patrol of Philadelphia, a corporation to save life and property in and contiguous to burning buildings, being without money capital, but supported by voluntary contributions of fire insurance companies, making and dividing no profits and saving property, whether insured or not, is a public charity. In the course of its opinion the court approved Lord Camden's definition of a charity, expressed in Jones *v.* Williams, *supra*, and also quoted approvingly the definition of a charity formulated by Mr. Justice Gray in Jackson *v.* Phillips, 14 Allen, 539, 556, as follows: "A charity in legal sense may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion; by relieving their

bodies from disease, suffering, or constraint; by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

In Perin *v.* Carey, 24 How., 465, 506, the Supreme Court of the United States said: "All property held for public purposes
49 is held as a charitable use in the legal sense of the term charity;" and in Ould *v.* Washington Hospital for Foundlings, *supra*, the court declared: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well doing and well being of social man."

Guided by the foregoing authorities, we confidently reach the conclusion that the grant by the Penns of the lot of ground in controversy in trust for the erection thereon of a court-house for the public use and service of the county of Northampton was a grant for a charitable use in the legal sense. Now, as we have already seen, the deed of conveyance contains no express provision for a forfeiture or reverter to the grantors or their heirs in the event of non-user or misuser, and, in the absence of such express provision, no right or re-entry to defeat the charitable use is to be implied. It follows, therefore, that the plaintiff was without title to maintain this ejectment. For the non-use or misuse of the trust property, the county of Northampton is answerable only to those immediately interested in the trust or to the Commonwealth of Pennsylvania. Barr *v.* Weld, *supra*; Vidal *v.* Girard's executors, 2 How., 127, 191; *In re* Mercer Home, *supra*.

The court below was right in instructing the jury to find a verdict for the defendants, and accordingly the judgment is affirmed.

50 United States Circuit Court of Appeals, Third Circuit, September Term, 1895.

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| WILLIAM DUGALD STUART, an Alien and Subject of the Queen of Great Britain, Resident in England, Plaintiff in Error, | |
| *vs.* | No. 18. |
| CITY OF EASTON AND COUNTY OF NORTHAMPTON, Corporations Incorporated under the Laws of the State of Pennsylvania and Citizens of the said State, Resident in the Eastern District of Pennsylvania. | |

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

Philadelphia, June 9, 1896. WM. BUTLER, *J.*

51 UNITED STATES OF AMERICA, *sct:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages from one to fifty-one, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of William Dugald Stuart, an alien and subject of the Queen of Great Britain, resident in England, plaintiff in error, *vs.* City of Easton and County of Northampton, corporations incorporated under the laws of the State of Pennsylvania and citizens of the said State, resident in the eastern district of Pennsylvania, No. 18, September term, 1895, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of July, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of United States the one hundred and twenty-first.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. V. WILLIAMSON,
*Clerk U. S. Circuit Court of Appeals, Third Circuit.*

52 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Being informed that there is now pending before you a suit in which William Dugald Stuart is plaintiff in error and The City of Easton and The County of Northampton, defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
53 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of November, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

54 [Endorsed:] Supreme Court of the United States. No. 556. October term, 1896. William Dugald Stuart *vs.* The City of Easton *et al.* Writ of certiorari.

55 WILLIAM DUGALD STUART, an Alien, a Subject of the Queen of Great Britain, Residing in London, England.
*vs.*
THE CITY OF EASTON AND COUNTY OF NORTHAMPTON, Corporations of the State of Pennsylvania, Citizens of said State and Residents of the Eastern District Thereof.

U. S. S. C., Oct. Term, 1896. No. 556.

It is understood and agreed by and between counsel in the above cause that the certified copy of the record presented with the petition for a writ of certiorari from the determination of the circuit court of appeals of the 3rd circuit in the above case, of *of* October term, 1895, No. 18, shall be taken as a return to the writ of certiorari issued by this court to said circuit court of appeals.

AARON GOLDSMITH,
*Attorney for City of Easton.*
EDW'D J. FOX,
*Solicitor for the County of Northampton.*
C. BERKELEY TAYLOR,
A. T. FREEDLEY,
WM. BROOKE RAWLE,
*For Plaintiff in Error, Plaintiff Below.*

56 UNITED STATES OF AMERICA, *sct:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto annexed as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this ninth day of December, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

WM. V. WILLIAMSON,
*Clerk U. S. Circuit Court of Appeals, Third Circuit.*

57 [Endorsed:] No. 556. Oct. term, 1896. United States circuit court of appeals, third circuit. Wm. Dugald Stuart *vs.* The City of Easton *et al.* Certified copy of consent of counsel to return of writ.

58 [Endorsed:] Case No. 16,335. Supreme Court U. S., October term, 1896. Term No., 556. Wm. Dugald Stuart, plaintiff in error, *vs.* The City of Easton *et al.* Writ of certiorari & return. Filed Dec. 10, 1896.

SUPREME COURT OF THE UNITED STATES.

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*William Dugald Stuart, an alien, a subject of the Queen of Great Britain, residing in London, England,*

vs.

*The City of Easton and County of Northampton, corporations of the State of Pennsylvania, citizens of said State and residents of the Eastern District thereof.*

October Term, 1894.

No. 151.

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TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William Dugald Stuart, substituted plaintiff in the above cause, respectfully represents that William Stuart commenced an action of ejectment against the above-named defendants in the Circuit Court of the United States for the Eastern District of Pennsylvania, to April Sessions, 1888, No. 51.

That said action was proceeded with to trial, and resulted in a binding instruction by the court to the jury to find a verdict for the defendant, and thereupon the said William Stuart sued out a writ of error to your Honorable Court, which, on or about the fifteenth day of January, 1895, as of the above term and number, was called for argument.

When the said case was being argued it appeared that the pleadings were defective in that the said William Stuart was described as a "citizen of London, England," and not as an alien. Upon this defect being suggested your Honorable Court directed the argument to proceed, stating that if it was found that this defect was fatal to the cause the same might be

returned to the Circuit Court for amendment, and immediately returned to your Honorable Court after the amendment had been made, and might then be heard upon briefs without further oral argument as a case partly heard, and thereupon the argument was proceeded with and concluded.

Subsequently your Honorable Court reversed the said cause solely upon the ground of alienage, at the costs of the plaintiff in error, with leave to amend the record in the court below.

Subsequently, to wit, upon the third and fourth days of April, 1895, the pleadings in the said cause having been duly amended so as to show the alienage of the plaintiff and the citizenship of the defendants, the cause came on before his Honor Judge Dallas and a jury for trial.

Whereupon the said cause was tried upon precisely the same evidence and with precisely the same rulings as were had upon the former trial, his Honor Judge Dallas being of the opinion that it would facilitate the speedy determination of the cause that the same rulings should be made as had already been made in 1888, and thereupon a bill of exceptions similar to the one sealed in the year 1888 was duly sealed in the said cause.

The question in the case turned upon the right of the descendants of William Penn, the original proprietor of Pennsylvania, to recover a square of ground in the city of Easton, conveyed September 28th, 1764, by the then proprietaries to certain trustees, "Their heirs and assigns forever In Trust, nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever"

The circuit judge withdrew the case from the jury, saying:—

"It does seem to me that on the face of this deed to these trustees it was not for their own use and benefit, but for the use and benefit of the people of Northampton County in the erection and use of public buildings. It is therefore a trust, it seems to me, and the plaintiff has no interest in this question whatever.

"If this land had been diverted to any other purpose than the one named in the deed it does not affect his interest in any way, but affects only those for whose use the conveyance was made, and he has, therefore, no right to maintain any action of ejectment for the recovery of this land on the ground that it was not conveyed irrevocably by the deed from the Penns.

"I therefore instruct you that such is the effect of the conveyance and the plaintiff is not entitled to maintain this action, and your verdict should therefore be for the defendant."

This instruction was affirmed in the opinion filed in the Circuit Court of Appeals, namely, that in a deed wherein the *habendum* contained the above clause a trust in fee was created.

It was contended in the Circuit Court of Appeals and is urged here that this is a new rule in the law of real property, and amounts to saying that where property is conveyed to public use the grantor cannot limit the quantity of the estate granted.

Up to the time of this decision it had been held in Pennsylvania and elsewhere that a grant to A. and his heirs "for a certain use and for no other use" created a conditional or base fee whether A. was an individual, a trustee or a charity, and at least two cases to this effect had been decided in Pennsylvania, namely:—

Kirk *vs.* King, 3 Pa., 436;

Sheetz *vs.* Fitzwater, 5 Pa., 126.

These cases have never been reversed, but have, on the contrary, been affirmed and referred to as settling the law there.

Church *vs.* Public Ground Co., 103 Pa., 613;

Slegel *vs.* Lauer, 148 Pa., 236;

the last case being as late as 1892.

No attempt was made by the Circuit Court or the Appeal Court to distinguish or explain these cases, and it is strongly urged upon the court that the effect of this decision will be to unsettle titles in Pennsylvania and produce a conflict between the Federal and the State courts as to a rule in the law of real property wherein the Federal courts have always followed the *lex loci rei sitæ*.

Your petitioner files herewith, as required by Rule 37, a certified copy of the entire record of the case in the Circuit Court of Appeals, and respectfully shows that this cause has already been partly heard by your Honorable Court, and that the question involved is one of such gravity and importance as to justify an application to your Honorable Court to require the record of the said proceeding to be certified to the Supreme Court for its review and determination.

Your petitioner therefore prays that your Honorable Court will issue a writ of error according to the statute to the United States Circuit Court of Appeals for the Third Circuit to bring up the record of the said cause of Stuart *vs.* The City of Easton and County of Northampton, of September Term, 1895, No. 18, so that the same may be heard by your Honorable Court. And your petitioner will ever pray.

(Signed) WILLIAM DUGALD STUART,

*By his Attorney in Fact,*

(Signed) WM. BROOKE RAWLE.

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STATE OF PENNSYLVANIA, }
CITY OF PHILADELPHIA, } *ss.*

William Brooke Rawle, attorney in fact of William Stuart, being duly sworn, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

Sworn to and subscribed before me, this day of , A. D. 1896.

## ARGUMENT.

The question in the case is, whether the grant of September 28th, 1764, made by the proprietaries of Pennsylvania to John Jones and others in trust for the erecting a court house for the public use of Northampton County, *and for no other use, intent, or purpose whatsoever* (see Exhibit No. 4 of the Transcript of Record, page 16, for the deed in full), created a conditional estate or an unrestricted fee simple.

The conveyance by the proprietaries was upon a nominal consideration. They were willing to give their land for use as a court house, but not for any other purpose. They therefore expressly imposed that condition in their grant, and by the plainest language. They conveyed an estate by a grant which was to be commensurate in duration with the purpose to be answered by it. The grantees accepted the gift under and subject to the condition imposed. They held it upon that tenure. They have now definitely and irretrievably abandoned the purpose for which the lot was granted. Yet, notwithstanding, they seek to retain the gift, and, in opposition to the plain language of the grant, to claim that no restriction upon their rights exists; they claim an unfettered estate, with full power of perversion to any use, intent, or purpose they desire, and with full power of alienation; and while claiming the benefit of the grant to them, attempt to reject the conditions upon which that grant was made. They seek the benefit of the gift without its burdens. They invoke the aid of one part of the conveyance, viz., the premises, and they seek to reject another part thereof, viz, the *habendum*.

But, as was said by this court in Cowell *vs.* Springs Co., 100 U. S., 57, where an ejectment for a breach of a condition was sustained: "The answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. * * * The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter houses, soap factories, distilleries, livery

stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods."

And, as was further said by this court (100 U. S., page 61): "The grantee took his title from the company with a condition. * * * And he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff or the validity of the title conveyed by its deed. Upon obvious principles he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it."

It is submitted:—

I. A conveyance for a specified purpose and for "no other use, intent, or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

II. This rule of construction applies equally whether the conveyance is or is not to trustees or a charity.

## I.

### A conveyance for a specified purpose and "for no other use, intent, or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

Grants similar to the present, to wit, for a particular purpose and "for no other use or purpose," have always been held in Pennsylvania to create conditional estates.

In *Kirk* vs. *King*, 3 *Penna. St. Rep.*, 436, a lot was granted to the employers of the school at Plumb Creek, to have and to

hold said lot for an English school house *and no other purpose* to them who now are or may hereafter be the employers of said school forever. In 1815 a school house was built upon said lot; in 1836 it was abandoned, and so continued until 1843, when the grantor entered for condition broken. Plaintiffs brought trespass. The court below took the same view that the court below in the present case did, but upon appeal the Supreme Court reversed, saying per Gibson, C. J.:—

"McElroy's conveyance to the employers of the school at Plumb Creek, being an unincorporated association, was void at law for want of a grantee capable of taking, and the legal title remained in the grantor, subject to the uses declared in the deed. * * * Second, the nature of their right depends on the terms of the agreement, which was to use the ground 'for an English school house *and for no other purpose.*' And that was the substantial consideration of the grant, the nominal consideration of fifty cents being expressed under some vague apprehension that it might be essential to the raising of a use; and *the grant itself was consequently on an implied condition or agreement that the school should be kept up.* The grantor certainly did not agree to part with his land without receiving the benefit promised in return for it. We must hold it to be commensurate in duration with the purpose to be answered by it; and the question is, was the school permanently abandoned. At the time of the defendant's entry it had been discontinued for the space of seven years, without any indication on the part of the employers of an intention to so use it, and this was certainly enough to raise a legal presumption of its abandonment. * * * It is not found that they require the ground for the use of a school, or that they intend to use it as such. The abandonment of the trust for seven years being irretrievable, the defendant, as the grantor's successor, had a right to enter and hold against all the world."

There is great similarity between that case and the present one.

1. The object of the deed was a school, as the object here was a court house.

2. There was but a nominal consideration, as here.

3. A trust was created, for though there the fee did not pass yet the court held the grantor was seized to the use or in trust for the school, as the trustees were here.

4. The court held the grantor seized of a trust upon condition that the school be kept up, as the trustees here hold upon condition that the court house be kept upon it.

5. The court held that the abandonment for seven years was irretrievable, and entitled the grantor's successor to re-enter and hold against the world.

This case in so far as it decided that a public school was not a charity has been dissented from, but in so far as it ruled the point for which it is here cited it has always been followed.

In *Sheetz* vs. *Fitzwater*, 5 Pa. St. Rep., 126, a grant was made of a mill dam, and also one perch of land on each side of said dam or pond, to and for the use and service of a certain mill, *and for no other use whatsoever*. The mill pond being subsequently drained and farmed, the grantee of the original grantor entered for condition broken, and trespass was brought against him. *Held*, he was entitled to re-enter.

*Krause, P. J.*, in the court below, said: "Emlen did not convey a fee simple estate in that land; he conveyed a qualified fee, determinable on the abandonment of Lardner, his heirs or assigns, of the use and service for which the conveyance was made, as stated in the deed. And in conveying such limited fee he retained the reversion in himself, and that he could permit to descend or sell to others. To convey such limited fee and to retain the reversion was his intention, as the court collects it from his deed."

Among the errors assigned upon appeal was the construction of Emlen's deed. This was affirmed by the Supreme Court, who, in reversing upon another point not connected with this, said: "There is only one assignment of error in this record which is sustained, and the other points are left to stand on the reasons of the judge, which seem to be satisfactory."

See the question of the base fee discussed in the arguments of counsel.

These cases were decided in 1846 and 1847. They have been consistently followed in Pennsylvania. Thus, in *Methodist Church* vs. *Public Ground Co., 103 Pa. St. Rep., 613* (decided in 1883), the Supreme Court, in construing the agreement in that case, held, that as said covenant and agreement only referred to a certain use of the land "without other words," such covenant or agreement did not create an additional estate, but that if the words "and for no other purpose" had been superadded, the result would have been different. Thus the court said:—

"Did the writing create a conditional estate? It contained none of the technical terms usually employed for that purpose, neither '*sub-conditione, proviso,*' nor '*ita quod.*' It is true no one of these is essentially necessary to constitute a condition; other words clearly equivalent thereto are sufficient. Hence, an estate conveyed for '*an* English school house *and no other purpose*' was held in Kirk *vs.* King, 3 Pa. St. Rep., 436, to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Scheetz *vs.* Fitzwater, 5 *Id.*, 126, a conveyance of a mill dam or pond of water and mill race, and a perch of land on each side thereof, for the use and service of a certain mill, with the land thereunto belonging, '*and for no other use whatsoever,*' the title was held to be a base fee, determinable on disuse as a pond."

Accord, McKissick *vs.* Pickle, 16 Pa. St., 140;
Watters *vs.* Bredin, 70 *Id.*, 237.

The same doctrine was again affirmed in Pennsylvania, in
Slegel *vs.* Lauer, 148 Penna. St. Rep., 236,
decided in 1892, and the foregoing was approved. In this case plaintiff's predecessor in title, by deed dated December 1st, 1772, conveyed a strip of ground eight feet wide and two hundred and thirty feet long, adjoining the wall of the prison in Reading, Pa., to the commissioners of Berks County and their successors, "To and for the use, intent, and purposes following; that is to say, to be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape

over the said prison wall by reason or means of any building to be erected contiguous to the same wall." In 1849 the prison was removed and the prison property sold. Plaintiff filed a bill to quiet the title of the eight feet adjoining the old prison wall on the ground that the fee conveyed to the commissioners was a base fee determinable upon cessation of the use of the property for that purpose, and a decree to that effect was entered. Endlich, J., whose opinion was adopted by the Supreme Court, says (148 Pa. St., 244): "The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned and no other. But where an estate is conveyed in fee for a specified purpose '*and no other*,' the fee is a base fee determinable upon cessation of the use of the property for that purpose; Kirk *vs.* King, 3 Pa., 436; Sheetz *vs.* Fitzwater, 5 *Id.*, 126."

Hence when a grant is made for a particular purpose, and when to that purpose is superadded the words "and for no other purpose," or "for no other purpose whatsoever," the grantee's estate is conditional, and upon the cessation of the use the grantor may enter for condition broken.

Of course, the mere expression of a purpose will not of or by itself create a condition, particularly when that purpose is one disclosed by a separate instrument. Thus a grant in fee simple to county commissioners, "in trust and for the use of the inhabitants of Delaware County to accommodate the public service of Delaware County," was held not to create a base fee. In this case the conveyance was for a valuable consideration and a separate declaration of trust was executed by the trustees. The court, in its opinion, said: "Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way they might have had a plausible case on the cessation of the user."

Kerlin *vs.* Campbell, 15 Pa. St., 500.

So also a grant to the county commissioners of Union County, Pennsylvania, and their successors in office, of a tract

of land with a brick court house then erected upon it, "in trust for the use of the county in fee simple," was held to create a fee simple.

Seebold *vs.* Shitler, 34 Pa. St., 133.

Similarly a devise of land to a religious body in fee, "there to build a meeting house upon," &c., was held to pass a fee.

Griffiths *vs.* Cope, 17 Pa. St., 96.

Judge Rogers here distinguishes between cases where the grant is in fee for a certain purpose without more, and those where it appears that the estate ends when the use is abandoned. So a grant to a congregation "for the benefit, use, and behoof of the poor of said * * * congregation * * * forever," and "for a place to erect a house of religious worship for the use and service of said congregation, and if occasion require a place to bury their dead" (Brendle *vs.* German Reformed Congregation, 33 Pa., 415), was held to pass a fee simple.

These cases obviously have no application to the present case.

It is unnecessary to add that decisions are not pertinent which relate to the construction of deeds upon mere recitals that the grant is upon a certain consideration, or where the covenants are collateral or in another instrument. As in—

Cook *vs.* Trimble, 9 Watts, 15;
Union Canal Co. *vs.* Young, 1 Watts, 410;
Perry *vs.* Scott, 51 Pa. St., 119;
Church *vs.* Pub. Ground Co., 103 Pa. St., 608.

This case differs also from the cases where a fee is vested in trustees without limitation, and then a purpose is suggested, either collaterally or in other than the granting clause of the deed, as in Barr *vs.* Weld, 24 Pa. St., 84, where a conveyance was to trustees and to their successors forever in trust for the district formerly called Utica School District, without even a direction to erect a school upon it.

Nor is the present the case of a charitable use, or one for the

application of the *cy pres* doctrine, where the court construes a primary charitable intention, as in—

Wright *vs.* Linn, 9 Pa. St., 433;

*In re* Mercer Home, 162 Pa. St., 232.

Every case cited by the Court of Appeals is either one of dedication wherein the trust is sought to be enforced, or goes simply to the point, that a grant in trust for a specified purpose, without more, does not of itself raise a technical condition—that such form of grant does not so negative other uses as to raise a conditional fee—that the grant is construed as a covenant or as a mere recital of purposes, and particularly so in case of charitable uses.

Taking the cases cited by the learned judge of the Court of Appeals in his opinion in their order:—

In Wright *vs.* Linn, 9 Pa., 433, the gift was to trustees to erect a school for the perpetual use of parties and the inhabitants who might reside nearer this school than any other.

In McKissick *vs.* Pickle, 16 Pa., 140, the grant was to trustees for a school or church with an express clause of re-entry. This right of re-entry was strictly construed, but that it created a conditional estate was expressly admitted.

In Griffith *vs.* Cope, 17 Pa., 96, the grant was to a religious body to build a meeting house upon.

In Barr *vs.* Weld, 24 Pa., 84, the grant was to trustees in trust for a school district without even a direction to build a school house upon the land.

*In re* Mercer Home, 162 Pa., 232, a devise of property providing that no part should be disposed of for any other use than as a home, it was held not to prevent a sale of a small portion where the funds were to be used for the same purpose, the court especially distinguishing that case from this line of cases in its opinion by saying:—

"Nothing short of a plain, unequivocal direction that no part of the land shall be parted with for any purpose whatever ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control required of them."

But on the other hand, as between the grantor and the grantee, when to the purpose specified in the grant there is expressly superadded the condition that the grant shall be "for no other use, intent, or purpose whatsoever," then technical words of condition *are* used and a conditional estate is created by the grant, such construction being a rule of property in Pennsylvania.

Kirk *vs.* King, 3 Pa., 436;
Scheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa., 613;
Slegle *vs.* Lauer, 148 Pa., 244.

The learned judge does not cite any case, whether for charitable purposes or otherwise, wherein these words were used in which a contrary doctrine was asserted. We may presume such cases do not exist.

In *Stuyvesant* vs. *The Mayor of New York City, 11 Paige, Ct., 427*, the same doctrine was applied where land was granted to New York City "upon the express condition that such lands shall at all times and forever thereafter be appropriated to and used for the purposes of a public square." Here the intention was clear that the purpose for which the land was granted was for a square only. *Held*, a condition, and that the grantor might file a bill to enforce the grant or enter for condition broken.

O'Brien *vs.* Wetherill, 14 Kan., 616;
Cowell *vs.* Springs Co., 3 Col., 82;
Collins Co. *vs.* Marcy, 25 Conn., 242;
Plumb *vs.* Tubbs, 44 N. Y., 442;
Cowell *vs.* Springs Co., 100 U. S., 55.

So, in Church *vs.* Grant, 1 Lead. Cases Am. Law, Real Property, page 173, Bigelow, J., says:—

"There is a further distinction in the nature of estates on condition. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect is reserved to the grantor and his heirs only,

which gives them the right to enter as of their old estate upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate."

And such possibility of reverter passes to the grantor's heirs.

Scheetz *vs.* Fitzpatrick, 5 Pa. St., 245.

## II.

### This rule of construction applies equally whether the conveyance is or is not to trustees or to a charity.

The court below seemed to consider that because the conveyance was to trustees the ordinary rule of construction was altered. It is submitted that no such distinction exists. There is no reason for such distinction. The *grantor's* reserved estate is the same whether the conveyance is to A. for his own use, for a specified purpose and for no other, or for the use of some one else for a specified purpose and for no other. In both cases the legal estate is in A., and the legal reservation to the grantor is the same. The words creating the condition are the same in either case. Hence the construction is the same.

The court below ignored the fact that the question at issue was the *grantor's* estate. It determined the question on doctrines solely applicable between trustee and *cestui que trust* in cases where the trustee improperly diverts the subject matter of the trust against the declared wishes of the *cestui que trust.*

Kirk *vs.* King, 3 Penna. St., 441, was the case of an equitable estate, for the conveyance, being to an unincorporated association, was void at law.

In *McKissick* vs. *Pickle, 16 Penna. St., 140,* a conveyance to certain persons, their heirs and assigns, *in trust* for the use of a school house, provided that if at any time thereafter the premises should be converted to any other use the lot should revert to the grantor and his heirs.

Here an express trust created in fee was held qualified by the *habendum* into an estate upon condition.

So in the second appeal of the case of McKissick *vs.* Pickle, 21 Penna. Rep., 232, the Supreme Court held that if the jury found that the trustees had for seven years permitted the property to be used as a dwelling house their conditional estate was determined and the grantor was entitled to recover for condition broken.

In Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a base fee, which terminated when the premises ceased to be used for the specified purpose.

The Court of Appeals decided that a gift to build a court house is a gift for charitable uses; that no conditional estate can be created where the land is to be devoted to charitable purposes, and that as there is no express clause in the deed reserving a right of entry the grantor cannot take advantage of breach of condition. While a gift for purpose of a court house may, perhaps, in a certain measure, be regarded as a charitable use, it is certainly not a charity in the broad sense of the word. Neither is a jail. Both are classed together in the Tax Acts, and are not exempted from taxation as being charities, but as being "public property used for public purposes."

But the question whether a court house is or is not a charity is wholly foreign to the present case. The question here presented is, does the grant create a conditional estate as between grantor and grantee? The construction of the words of the grant will be precisely the same whether the grantees hold for charitable uses or not. A grant of a conditional estate may be made to any one and for any lawful purpose, and it is immaterial whether the grantees take as trustees or in their own right; whether they take for a charity or for private ends; whether they take for public or for individual purposes.

A grantor has a perfect right to say that he will voluntarily give his property for a particular charitable use and for no other purpose, and that the land shall revert to him if that particular use is discontinued. The sole question in such case is, has the grantor so declared by the instrument containing his gift? The language of the present grant by the Pennsylvania rule of real property construction expressly so declares.

Hence the question in the present case is, do words which would undoubtedly create a conditional estate when applied to a grant for general purposes fail of their effect and bear some other construction because the grant is for a particular charitable or *quasi* charitable purpose? It is submitted that if the words used create a conditional estate, as they have always hitherto been decided to do, it is immaterial for what purpose the grantees are to hold the property. The distinction is accurately drawn in Barr *vs.* Weld, 24 Pa., 86, where there were no words creating a condition.

And in Pennsylvania conditional estates and rights of entry for breach thereof exist without the reservation of specific clauses of entry.

Kirk *vs.* King, 3 Pa., 436;
Sheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa.;
Courtney *vs.* Kellar, 4 Pennypacker, 38;
Slegle *vs.* Lauer, 148 Pa. State, 236.

The defendants in error in their brief state that Kirk *vs.* King, 3 Pa. St., 436, was overruled by Wright *vs.* Lind, 9 Pa. St., 433. This is an error. A reference to the decisions themselves proves the contrary, and upon the point of construction of the words of grant, Kirk *vs.* King has always been recognized as sound law, even as late as 1892. See—

Methodist Church *vs.* Public Ground Co., 103 Pa. St., at page 613;
Slegle *vs.* Lauer, 148 Pa. St., at page 244.

Moreover, in the present case the trustees were in reality the county, and by Act of Assembly of 1834 the title was expressly vested in the county.

Act of 15th April, 1834, P. L., 538, sections 3 and 9;
1 Purdon (12th ed.), page 436, pl. 12–18.

The condition was broken after the trustees' title had ceased, and when there was no equitable estate. The object of the original appointment of trustees was because the county did

not possess the corporate power of holding real estate in its own name. In early times counties had not full corporate powers, and in Pennsylvania, as in other States, all titles for the counties were taken by trustees; thus was title taken to Independence Square in Philadelphia and all court houses and prisons in Pennsylvania. See Act 18th February, 1780, 1 Smith's Laws, 484.

In speaking of the title thus taken by trustees, Ch. J. Shaw, in

*Atty. Gen.* vs. *Federal St. Meeting, 3 Gray (Mass.), 1,*

a case much like this, says: "Supposing, then, that most of the old societies of Boston were formed by association without any acts of incorporation, and there being no other body capable in law of taking and holding the fee and legal estate of the land to be used for a church edifice and its incidents, the natural expedient would present itself, when an agreement had been made by an unincorporated body of persons associated together to form a new religious society with the owner of the land for its purchase to take a deed to and for the use and benefit of the whole in the names of a few, who in their natural capacity could take and hold the legal estate in fee in trust for those who had thus associated to form such a society, and who had raised the money for that purpose. In such case the trustees would hold nearly the same relation to the pew holders, the contributors, and members of the society so associated as the corporation, whether of a territorial or poll parish, would hold to the members, the legal estate would be in the trustees, and the entire use and beneficial interest in the members of the society."

In that case the grant was to trustees, without words of inheritance, for the benefit of a congregation (according to the tenures of the Church of Scotland), to hold and enjoy the lands whereon the meeting houses are erected forever, and for no other use, intent, or purpose whatsoever.

*Held, First.*—As the trustees needed a fee, that such was granted.

*Second.*—That the trust changed by the change of form of worship of the congregation.

*Third.*—That as between the trustees and the congregation, after an occupation of forty years, the title was in the congregation.

In *Brendle* vs. *Congregation, 33 Pa. St., 415*, where a gift was to trustees "in trust for a place to erect a church and for a burial ground," it was held to vest an executed legal estate in the congregation itself.

LOWRIE, Ch. J.: "The use of the medium of trustees was mere matter of form, and does not at all make this case a charitable use. Such trustees seldom, if ever, convey to successors, but title in their name is treated as title of the congregation, to be used by the congregation at their discretion, as the law allows."

It was to obviate doubt as to the *status* of the estate of the county in such grants that the provisions of the Act of 1834 were suggested by the revisers of the Civil Code of Pennsylvania, who in their third report, dated December 31st, 1832, page 5, stated: "Whether they constitute a corporation remains unsettled as a general question. * * * We think that it will be found advantageous to declare every county and township a body corporate for certain purposes." And to effect this the revisers suggested the Act of 1834 which was subsequently passed by the legislature, as suggested by the revisers, and is as follows:—

"The titles to all and singular the court houses, jails, prisons, and workhouses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to be, vested in the respective counties for the use of the people thereof, and for no other use."

Act 15th April, 1834, section 9, P. L., 538; 1 Purdon's Digest (12th ed.), page 436, pl. 18.

In the present case the grant was as much to the county as it was possible to make it, and if the county had been capable of taking, and the grant had been to it, for the use of a court house and no other use, it would have been a condition. Can it be less if to a trustee in trust for such use?

But the question does not really arise. For the condition was violated and the land diverted to other uses by the county itself while holding the legal title long after the trustees' title had been abolished and the equitable estate merged into the legal title.

Hence the learned judge ruled the case upon an immaterial point, for at the time of condition broken no trust existed.

Again, from another standpoint, the same result is reached. It is a familiar and universal rule of construction that a trustee's title "is commensurate in duration with the purpose to be answered by it."

Kirk *vs.* King, 3 Penna. St., 441.

Or, as stated in Perry on Trusts:—

"The general rule is that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more and no less. Courts will abridge the estate where words of inheritance are used if the execution of the trust does not require a fee, and so they will enlarge the estate if no words of inheritance are used in a deed."

1 Perry on Trusts, section 320 (citing many cases).

So, again, in 1 Perry on Trusts, section 312, the same principle is thus stated:—

"The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or

otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts: First, 'whenever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not;' and second, '*Although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.*'"

1 Perry on Trusts, section 312 (citing many cases).

So in Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was made to trustees and their sucessors in trust to build a church "for the members of the Methodist Church, so long as they use it and no longer, and then to return back to the original owner;" and it was held that the trustees' estate terminated when the house ceased to be used as a place of worship according to the discipline of the Church.

In the present case the purpose to be answered by the trust is the use of the land for the use of a court house "for the public use and service of the said county, and to and for no other use, intent, or purpose whatever." That use has now definitely determined. For over thirty years the land has been abandoned for any such use. The court house building thereon erected has been torn down, removed, and permanently erected in another place. The purpose to be answered by the trustees' estate has ceased. Hence the trustees' estate also ceases.

Therefore, whether we consider the case as one of the *quantum* of the estate of the trustees, or as one of the *quantum* of the grantor's reservation, the same conclusion results. In either case the heirs of the grantor are entitled to recover.

Moreover, the construction for which we contend has been hitherto concurred in by the defendants. In 1703 a conveyance, similar to the one now in controversy, was made by

Richard and Thomas Penn. It was to trustees in trust for the county defendant for the purposes of a prison, "and for no other use whatever." (See Exhibit No. 11, Record, page 27.) The use of the lot for prison purposes was discontinued, and the county desired to acquire the fee simple, so that they could use the property for other purposes. Accordingly, in 1852, the county defendant bought from Granville and Richard Penn (the then heirs at law of the Penns), for a valuable consideration, their reversionary interest in the property, by deed reciting that "The county of Northampton is desirous of becoming the owners of the said lot of ground, with the appurtenances, in fee simple, to be by them occupied and enjoyed for all and every purpose whatsoever they may deem proper, and at pleasure to sell and convey the same free from all and every restriction, estate, and incumbrance whatever." If, as the defendants now contend, they are entitled under a similar conveyance to use the property for any purpose they may deem proper, and if, as they contend, the plaintiff has no reserved estate under such conveyance, why did the defendants purchase such title in 1852 from the plaintiff's ancestor, and recite that otherwise the property could not be perverted to other uses. This was a construction directly by the parties themselves of a similar conveyance under identical facts.

Evidence of these facts was offered at the trial, but rejected by the learned judge, and exceptions duly taken. The rejection of this evidence is embraced in the fourth assignment of error.

To show the interest this case has created counsel append an article that appeared in the American Law Register for June, 1896, vol. XXXV., N. S., page 402, with the preparation of which counsel had nothing to do, as follows:—

"Reverter of Land Granted for Special Purpose. *Stuart* vs. *City of Easton and County of Northampton*, June, 1896 (not yet reported), United States Circuit Court of Appeals for Third District.

"In 1764, Thomas Penn and Richard Penn conveyed 'a lot of ground unto AB. *et al.*, their heirs and assigns forever in trust nevertheless, to and for the erecting thereon a court

house for the public use and service of the said county, *and to and for no other use, intent or purpose whatsoever.*' The patent contains no punctuation. These trustees had been authorized in 1752 by an Act of Assembly 'to take assurances of a piece of land for the use of the inhabitants of said county, and thereon to erect a court house and prison,' &c.

"By virtue of an Act of Assembly of 1834 (P. L., 538), the title of the trustees became vested in the county of Northampton. A court house was erected upon the ground and remained there until 1862, when it was removed, and no other buildings have been erected thereon since. In 1888, the heir at law of the Penns made entry for breach of condition, and brought ejectment. The question arises, Does the patent of 1764 convey a fee simple absolute or an estate upon condition, a base fee?

"The learned court evaded this question by separately construing the premises and the *habendum*: 'The succeeding words in trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose, whatsoever defined the relation between the grantees and the inhabitants of the county, and restrained the grantees from any other application of the property than to the avowed object of the grant.'

"Surely this is a strained construction; in none of the cases cited has it been even suggested. The court continues: 'In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate, determinable by re-entry upon nonuser, was intended?' After the above disposition of a stipulation, which, in Pennsylvania, whose decisions the court is bound to follow in this case, has always been held to constitute a fee upon condition, the learned judge asks for an express stipulation.' The court was of opinion that the grant was a charitable use, and that in the absence of an express provision for a reverter to the grantors in the event of a misuser or nonuser, no right of entry to defeat such use was to be implied. The consideration of that question has no place in the decision of this case.

"It has never been disputed that a man may make such legal disposition of his property as he chooses, and when he has made such conveyance the courts are bound to effectually construe his deed. Fees upon condition have been recognized immemorially.

"It is settled that the mere expression in a conveyance of the purpose of a grant will not, of itself, create a condition: *Kerlin* vs. *Campbell*, 15 Pa., 500 (1850); *Seebold* vs. *Shittler*, 34 Pa., 133 (1859). A base fee may be created without the usual technical words, *sub conditione*, *proviso*, *ita quod*: *Church* vs. *Ground Co.*, 103 Pa., 613 (1883). Nor is an express stipulation that, upon breach of condition, the grantor may re-enter, necessary; it is implied as part of the grant: IV. Kent Com., 123; *Gray* vs. *Blanchard*, 8 Pick., 284; *Osgood* vs. *Abbott*, 58 Me., 80. Where conveyances in fee simple, stating the purpose of the grant, were made, with the superadded words, 'and for no other use whatsoever' (*Sheetz* vs. *Fitzwater*, 5 Pa., 126 (1847); 2 L. C. Am. R. P., 13), 'and no other purpose' (*Kirk* vs. *King*, 3 Pa., 436 (1846); *Crane* vs. *Hyde*, 135 Mass., 147), it was held that base fees were granted. In *Kirk* vs. *King* the conveyance was to a trustee. And as recently as 1892, in *Slegel* vs. *Lauer*, 148 Pa., 244, the Supreme Court, in a two line *per curiam* opinion, adopted the exhaustive opinion of Endlich, J., where a conveyance made to county commissioners for a specific purpose, without superadded words, was held to convey a fee upon condition, the use for the particular purpose constituting part of the consideration for the grant. The learned judge, in this case, said: 'But, where an estate is conveyed for a specific purpose, "and no other," the fee is a fee upon condition, determinable upon cessation of the use of the property for that purpose: *Kirk* vs. *King* (*supra*); *Sheetz* vs. *Fitzwater* (*supra*); *a fortiori* should the words '*to and for no other use intent or purpose whatsoever*' constitute a fee upon condition.'

"Agreeing with the learned judge that a grant for such a purpose might be a charitable use, it is submitted that the premises for such conclusion are wanting here. The conveyance to the trustees authorized by Act of Assembly to receive

such assurances was, in the language of Lowrie, C. J., in construing a similar deed to trustees in trust for a church congregation, 'mere matter of form,' and does not at all make this case a charitable use:' *Brendle* vs. *Congregation*, 33 Pa., 415 (1858). In that case the deed was held to vest an executed legal estate in the congregation. Moreover, in 1834, the trustees' title became vested in the county, and during its tenure of the qualified fee simple estate the breach of condition occurred. When the specified purpose of the grant ceases, the estate of the trustees cease: *McKissick* vs. *Pickle*, 21 Pa., 232 (1853); *Henderson* vs. *Hunter*, 59 Pa., 335 (1868). In the latter case, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a fee upon condition, which terminated when the premises ceased to be used for the specified purpose. The same conclusion was reached in *Slegel* vs. *Lauer* (*supra*), where the conveyance in 1772 was to the commissioners, to and for the use, etc. Neither upon principle nor upon authority does the learned court's conclusion seem tenable.

"[It is a curious fact that in 1852, when these defendants removed from a lot granted by a similar patent for a prison, 'and for no other use whatever,' they purchased from the three heirs at law of the Penns their reversionary interest in the property.]"

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In addition to the cases in Pennsylvania which held that conveyances for particular purposes and for no other purposes create conditional estates, counsel have been able to find a number of cases in other States where the same rule has been applied.

### Massachusetts.

In Esterbrook *vs.* Tillinghast, 5 Gray, 21.

Where a devise was made to defendant in trust that he and his successors should appropriate the income of the devised property to support the Gospel in a church at Swanzea of a certain faith so long as the members of said church should maintain the visibility of the church in such faith, the heirs of the devisor filed a bill for the recovery of the property, alleging that the visibility had not been maintained, and that by the statutes of Massachusetts the property was revested in them as heirs at law of the devisor, to which bill a demurrer was filed which the court subsequently overruled, Metcalf, J., saying:—

"He (the trustee) holds the property since the failure of the trust by the extinction of the *cestui que* trust not for his own benefit, but for the devisor's heirs at law as a resulting trust."

### New Hampshire.

In Wood *vs.* Cheshire, 32 N. H., 421.

The heirs at law of a grantor sued out a writ of entry to recover premises granted for the purpose of erecting a courthouse thereon and for no other purpose, to have and hold the said premises "So long as the building thereon is occupied as a courthouse and no longer." There was no clause of re-entry in the deed. The court held that the estate was an estate upon a conditional limitation, and that as the lot had been abandoned the writ might be maintained.

CONNECTICUT.

In Scoville *vs.* McMahon, 62 Conn., 378.

Where a conveyance contained a clause providing that the land should be used for a cemetery and for no other purpose the court held that the conveyance was upon a condition subsequent.

MARYLAND.

In Reed *et al. vs.* Stauffer, 56 Md., 237 (1881).

A conveyance was made to trustees as a burial ground, "In trust nevertheless, and for the uses, intents, and purposes hereinafter mentioned and to and for no other use, intent, and purpose whatsoever." Two bills in equity were filed, one by the trustee for specific performance of the conveyance and one by the heirs at law of the grantor, alleging that the property could not be used for a burial ground, being within the limits of the city, and asking to have the property reconveyed to them. The court held that the lot might still be used as a burial ground, but that it must be in strict conformity with the terms of the deed, as any diversion from those uses would reinvest the grantor's heirs with the title.

In 2nd Universalist Society *vs.* Dugan, 65 Md., 460.

Which was a bill for specific performance of a contract for the sale of land, where the defendant alleged that the plaintiff who held title as trustees for the use of the Quakers about Baltimore and to and for no other use, intent, and purpose whatsoever, could not make a good title, the bill was dismissed. Irving, J.: "The uses are clearly and distinctly set forth, and in one of them (speaking of the deed) the words, "and for no other use whatsoever," are added, thereby expressly excluding the idea that a larger estate was intended to be granted.

INDIANA.

In Scott *vs.* Stipe, 12 Ind., 74.

In a grant to trustees of a certain church for the erection of a church, to be forever thereafter used as a house of worship,

and the church conveyed the land in fee, the heirs of the grantor commenced an action to recover the land, and it was held that the trustees had no power to sell the lot. Perkins, J.: "The misappropriation of the property granted—its diversion to secular uses—was a breach of the condition, and the breach of the condition worked a forfeiture of the estate and rendered it subject to be recovered back by the grantor or his heirs in a suit at law or in equity. The condition broken gave the right of re-entry."

In The I. P. & C. R. R. Co. *vs.* Hood, 66 Ind., 581.

Where land was conveyed to the railroad company "for and in consideration of the permanent location and construction of a depot for said railroad thereon," and the depot was constructed upon said property, but subsequently removed, it was held in a suit by the heirs of the grantor that the removal constituted a breach of the implied condition subsequent contained in the deed, and that the real estate therefore reverted to the grantor.

ILLINOIS.

In Mott *vs.* Danville Seminary, 129 Ill., 405.

Where a conveyance was made to trustees for building and maintaining on the ground an institution of learning, as provided by the Act of 1849, it was held that the deed was made upon a condition subsequent that the board should maintain upon the land an institution of learning, and that the land did not revest in the grantor or his heirs until election by them, shown by re-entry or some equivalent act.

In none of the above cases were there clauses of re-entry.

No. 197.

No. 197. October Term, 1897.

Office Supreme Court, U. S.
FILED
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CLERK

Brf. of Taylor, Freedley & Rawle

# Supreme Court of the United States.

for P. E.

Filed Dec. 28, 1897.

William Dugald Stuart, an alien, a subject of the Queen of Great Britain, residing in London, Plaintiff in Error,

*vs.*

City of Easton and County of Northampton, corporations incorporated under the laws of the State of Pennsylvania and citizens of said State, resident in the Eastern District of Pennsylvania, Defendants in Error.

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## BRIEF FOR PLAINTIFF IN ERROR, ON A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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W. BROOKE RAWLE,
*For Plaintiff in Error.*

Allen, Lane & Scott, Prs., Phila.

(16,335)

(10,386)

SUPREME COURT OF THE UNITED STATES.

---

*William Dugald Stuart, &c., Plaintiff in Error (Plaintiff below),*

vs.

*The City of Easton and the County of Northampton, &c., Defendants in Error (Defendants below).*

October Term, 1897.

No. 197.

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# *BRIEF FOR PLAINTIFF IN ERROR.*

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## HISTORY OF THE CASE.

This was an action of ejectment. It was brought by the heir at law of the Penns, the former proprietaries of Pennsylvania, and the present owner of the Penn estate in that Commonwealth. The question turns upon the construction of the grant of 28th September, 1764. (Record, page 16, Exhibit No. 4.)

By an Act of General Assembly of the Province of Pennsylvania, passed March 11th, 1752, the upper portion of Bucks County was erected into a separate county called Northampton.

At that date counties were not possessed of full corporate powers, and hence the Act named John Jones and others as trustees of said county, with power under section 6 to acquire a lot in some convenient place in the town of

Easton, in said county, for the purposes of a court house and prison.

On July 9th, 1762, Thomas and Richard Penn, the proprietaries of Pennsylvania, issued a warrant to John Jones and others, the above-named trustees, for a lot eighty feet square in the centre of the great square at Easton.

Subsequently a survey of said lot was returned into the land office, and on September 28th, 1764, a patent was issued by said proprietaries to John Jones and others for said lot.

The grant was for a nominal consideration of five shillings and the reservation of an annual rent of a red rose.

The premises of the patent, after reciting the Act of Assembly, proceed, "Now know ye that for the further encouragement and better promoting the public benefit and service of the said town and county and for and in consideration of the yearly quit rent (one red rose) hereinafter reserved and of the sum of five shillings * * * we have given granted released and confirmed &c. unto the said trustees John Jones &c. and their heirs the said lot" (Describing it.)

The *habendum* of the patent was as follows:—

TO HAVE AND TO HOLD the said hereinbefore described lot of ground with the appurtenances unto the said John Jones Thomas Armstrong James Martin John Rinker, and Henry Allshouse their heirs and assigns forever in trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county *and to and for no other use intent or purpose whatsoever*" (See Exhibit No. 4, printed copy of Record, page 16, for said deed in full.)

By the subsequent Act of Assembly of 15th April, 1834, P. L., 538, the title of the trustees became vested in the county of Northampton.

Between the years 1763 and 1766 a court house was erected on the lot, which was used by the county until 1862, when it was torn down, and the place where it stood has since been used as an open square by the city of Easton. The court house has been erected elsewhere and

the lot in question definitely abandoned as a court-house site.

On July 25th, 1888, William Stuart, who was the heir at law of Thomas and Richard Penn, as appears by sundry wills and descents (Exhibit No. 5, page 17, &c., of the printed Record), caused an entry to be made on the said land for breach of the condition in the above patent, and subsequently brought this action of ejectment to recover possession of the same. The court directed a verdict for defendant, holding that in a deed wherein the *habendum* contained the above clause a trust in fee was created. A writ of error was taken to this court and the case fully argued on the merits. During the argument of the case it was suggested by this court that the proceedings were defective, in that the plaintiff was described as a "citizen of London, England," and not as an alien. Upon this defect being suggested, this Honorable Court directed the argument to proceed, stating that if it was found that the defect was fatal the case might be returned to the Circuit Court for amendment. This court subsequently reversed solely on the ground of alienage. (See 156 U. S., 46.)

The pleadings were amended, and the case retried on the same lines as previously. The circuit judge made the same ruling out of comity to his predecessor and the Circuit Court of Appeals affirmed the judgment. Thereupon this court granted this *certiorari*.

Upon the trial plaintiff offered in evidence certified copies of a survey of one thousand acres, embracing, *inter alia*, the premises in dispute, returned into the land office of Pennsylvania October 8th, 1736, No. 47, for the plat upon which the town of Easton lay, and of an extract from the book of proprietary rights in the land office, showing that said tract was reserved by the proprietaries themselves (Exhibit Nos. 7 and 8, printed Record, pages 25, 26); these were admitted by the court. Plaintiff also offered a series of deeds by the proprietaries both before and after the divesting Act of 1779, and a certificate from the land office that the Commonwealth had not granted any land within the lines of this survey; and also offered other con-

veyances between the Penns, as proprietaries of Northampton County, whereby the latter recognized the conditional estate of the plaintiff's ancestors reserved in similar conveyances. These were offered for the purpose of showing a contemporaneous course of construction and conduct on the part of the proprietaries and the Commonwealth and Northampton County, recognizing the ownership by the proprietaries of this tract. These deeds and this certificate were rejected by the court and form the subject of exceptions.

## ASSIGNMENTS OF ERROR.

*First.*—The learned judge below erred in instructing the jury to find a verdict for the defendant.

*Second.*—The learned judge erred in instructing the jury as follows: "I therefore instruct you that such is the effect of the conveyance, and the plaintiff is not entitled to maintain this action, and your verdict should therefore be for the defendant."

*Third.*—The learned court below erred in not instructing the jury that the effect of the patent of the 28th September, 1764, was to create a conditional estate in the

## ASSIGNMENT OF ERROR.

The learned Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania.

*Fifth.*—The learned court below erred in refusing to admit in evidence plaintiff's Exhibit No. 12 (printed Record, page 29), being deed Granville John Penn and Richard Penn, proprietaries of Pennsylvania, to county of Northampton, for the conditional estate of the said proprietaries in the prison lot in the town of Easton, dated 24th September, 1852, recorded at Easton in Deed-book F, vol. VIII., page 226, &c.

*Sixth.*—The learned court below erred in refusing to admit in evidence plaintiff's Exhibit No. 13 (printed Record, page 31), being deed John Penn and Richard Penn, proprietaries of Pennsylvania, to Peter Snyder *et al.*, for lots

Nos. 70 and 72, 179 and 180, in the town of Easton, dated June 23d, 1802, recorded at Easton 20th September, 1802, in Deed-book G, vol. II., page 402, &c.

*Seventh.*—The learned court below erred in refusing to admit in evidence plaintiff's Exhibit No. 14 (printed Record, page 34), being a certificate from the land office in Pennsylvania showing that no warrants, surveys, or patents had been issued by the Commonwealth of Pennsylvania for lots in the town of Easton, Pa.

## ARGUMENT.

The question in the case is whether the grant of September 28th, 1764, made by the proprietaries of Pennsylvania to John Jones and others in trust for the erecting a court house for the public use of Northampton County *and for no other use intent or purpose whatsoever* (see Exhibit No. 4 of the Transcript of Record, page 16, for the deed in full), created a conditional estate or an unrestricted fee simple.

The conveyance by the proprietaries was upon a nominal consideration. They were willing to give their land for use as a court house, but not for any other purpose. They therefore expressly imposed that condition in their grant, and by the plainest language. They conveyed an estate by a grant which was to be commensurate in duration with the purpose to be answered by it. The grantees accepted the gift under and subject to the condition imposed. They held it upon that tenure. They have now definitely and irretrievably abandoned the purpose for which the lot was granted. Yet, notwithstanding, they seek to retain the gift, and, in opposition to the plain language of the grant, to claim that no restriction upon their rights exists; they claim an unfettered estate, with full power of perversion to any use, intent, or purpose they desire, and with full power of alienation; and while claiming the benefit of the grant to them, attempt to reject the conditions upon which that grant was made. They seek the benefit of the gift without its burdens. They invoke the aid of one part of the conveyance, viz., the premises, and they seek to reject another part thereof, viz., the *habendum*.

But, as was said by this court in Cowell *vs.* Springs Co., 100 U. S., 57, where an ejectment for a breach of a condition was sustained: "The answer is, that the owner of property has a right to dispose of it with a limited re-

striction on its use, however much the restriction may affect the value or the nature of the estate. * * * The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter houses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods."

And, as was further said by this court (100 U. S., page 61): "The grantee took his title from the company with a condition. * * * And he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff or the validity of the title conveyed by its deed. Upon obvious principles he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it."

It is submitted:—

I. A conveyance for a specified purpose and for "no other use intent or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

II. This rule of construction applies equally whether the conveyance is or is not to trustees or to a charity.

## I.

**A conveyance for a specified purpose and "for no other use intent or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.**

Grants similar to the present, to wit, for a particular purpose and "for no other use or purpose," have always been held in Pennsylvania to create conditional estates.

In *Kirk* vs. *King*, *3 Penna. St., 436*, a lot was granted to the employers of the school at Plumb Creek, to have and to hold said lot for an English school house *and no other purpose* to them who now are or may hereafter be the employers of said school forever. In 1815 a school house was built upon said lot; in 1836 it was abandoned, and so continued until 1843, when the grantor entered for condition broken. Plaintiff's brought trespass. The court below took the same view that the court below in the present case did, but upon appeal the Supreme Court reversed, saying per Gibson, C. J.:—

"McElroy's conveyance to the employers of the school at Plumb Creek, being an unincorporated association, was void at law for want of a grantee capable of taking, and the legal title remained in the grantor, subject to the uses declared in the deed. * * * Second, the nature of their right depends on the terms of the agreement, which was to use the ground 'for an English school house *and for no other purpose*.' And that was the substantial consideration of the grant, the nominal consideration of fifty cents being expressed under some vague apprehension that it might be essential to the raising of a use; and *the grant itself was consequently on an implied condition or agreement that the school should be kept up*. The grantor certainly did not agree to part with his land without receiving the benefit promised in return for it. We must hold it to be commensurate in duration with the purpose to be answered by it; and the question is, was the school permanently abandoned? At the time of the defendant's entry it had been discontinued for the space of seven years, without any indication on the part of the employers of an intention to so use it, and this was certainly enough to raise a legal presumption of its abandonment. * * * It is not found that they require the ground for the use of a school, or that they intend to use it as such. The abandonment of the trust for seven years being irretrievable,

the defendant, as the grantor's successor, had a right to enter and hold against all the world."

There is great similarity between that case and the present one.

1. The object of the deed was a school, as the object here was a court house.

2. There was but a nominal consideration, as here.

3. A trust was created, for though there the fee did not pass, yet the court held the grantor was seized to the use or in trust for the school, as the trustees were here.

4. The court held the grantor seized of a trust upon condition that the school be kept up, as the trustees here hold upon condition that the court house be kept upon it.

5. The court held that the abandonment for seven years was irretrievable, and entitled the grantor's successor to re-enter and hold against the world as the abandonment here should.

This case in so far as it decided that a public school was not a charity has been dissented from, but in so far as it ruled the point for which it is here cited it has always been followed.

In *Sheetz* vs. *Fitzwater*, 5 Pa. St., 126, a grant was made of a mill dam, and also one perch of land on each side of said dam or pond, to and for the use and service of a certain mill, *and for no other use whatsoever*. The mill pond being subsequently drained and farmed, the grantee of the original grantor entered for condition broken, and trespass was brought against him. *Held*, he was entitled to re-enter.

*Krause, P. J.*, in the court below, said: "Emlen did not convey a fee simple estate in that land; he conveyed a qualified fee, determinable on the abandonment of Lardner, his heirs or assigns, of the use and service for which the conveyance was made, as stated in the deed. And in conveying such limited fee he retained the reversion in himself, and that he could permit to descend or sell to others. To convey such limited fee and to retain the re-

version was his intention, as the court collects it from his deed."

Among the errors asigned upon appeal was the construction of Emlen's deed. This was affirmed by the Supreme Court, who, in reversing upon another point not connected with this, said: "There is only one assignment of error in this record which is sustained, and the other points are left to stand on the reasons of the judge, which seem to be satisfactory."

See the question of the base fee discussed in the arguments of counsel.

These cases were decided in 1846 and 1847. They have been consistently followed in Pennsylvania. Thus, in *Methodist Church* vs. *Public Ground Co., 103 Pa. St., 613* (decided in 1883), the Supreme Court, in construing the agreement in that case, held, that as said covenant and agreement only referred to a certain use of the land "without other words," such covenant or agreement did not create an additional estate, but that if the words "and for no other purpose" had been superadded, the result would have been different. Thus the court said:—

"Did the writing create a conditional estate? It contained none of the technical terms usually employed for that purpose, neither '*sub-conditione, proviso,*' nor '*ita quod.*' It is true no one of these is essentially necessary to constitute a condition; other words clearly equivalent thereto are sufficient. Hence, an estate conveyed for '*an* English school house *and no other purpose,*' was held in Kirk *vs.* King, 3 Pa. St., 436, to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Scheetz *vs.* Fitzwater, 5 *Id.*, 126, a conveyance of a mill dam or pond of water and mill race, and a perch of land on each side thereof, for the use and service of a certain mill, with the land thereunto belonging, '*and for no other use whatsoever,*' the title was held to be a base fee, determinable on disuse as a pond."

Accord, McKissick *vs.* Pickle, 16 Pa. St., 140;
Watters *vs.* Bredin, 70 *Id.*, 237.

The same doctrine was again affirmed in Pennsylvania, in

Slegel *vs.* Lauer, 148 Penna. St., 236,

decided in 1892, and the foregoing was approved. In this case plaintiff's predecessor in title, by deed dated December 1st, 1772, conveyed a strip of ground eight feet wide and two hundred and thirty feet long, adjoining the wall of the prison in Reading, Pa., to the commissioners of Berks County and their succesors, "To and for the use, intent, and purposes following; that is to say, to be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the same wall." In 1849 the prison was removed and the prison property sold. Plaintiff filed a bill to quiet the title of the eight feet adjoining the old prison wall on the ground that the fee conveyed to the commissioners was a base fee determinable upon cessation of the use of the property for that purpose, and a decree to that effect was entered. Endlich, J., whose opinion was adopted by the Supreme Court, says (148 Pa. St., 244): "The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned and no other. But where an estate is conveyed in fee for a specified purpose '*and no other*,' the fee is a base fee determinable upon cessation of the use of the property for that purpose. Kirk *vs.* King, 3 Pa., 436; Sheetz *vs.* Fitzwater, 5 *Id.*, 126."

Hence when a grant is made for a particular purpose, and when to that purpose is superadded the words "and for no other purpose," or "for no other purpose whatsoever," the grantee's estate is conditional, and upon the cessation of the use the grantor may enter for condition broken.

Of course, the mere expression of a purpose will not of or by itself create a condition, particularly when that pur-

pose is one disclosed by a separate instrument. Thus a grant in fee simple to county commissioners, "in trust and for the use of the inhabitants of Delaware County to accommodate the public service of Delaware County," was held not to create a base fee. In this case the conveyance was for a valuable consideration and a separate declaration of trust was executed by the trustees. The court, in its opinion, said: "Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way they might have had a plausible case on the cessation of the user."

Kerlin *vs.* Campbell, 15 Pa. St., 500.

So, a grant to the county commissioners of Union County, Pennsylvania, and their successors in office, of a tract of land with a brick court house then erected upon it, "in trust for the use of the county in fee simple," was held to create a fee simple.

Seebold *vs.* Shitler, 34 Pa. St., 133.

Similarly, a devise of land to a religious body in fee, "there to build a meeting house upon," &c., was held to pass a fee.

Griffiths *vs.* Cope, 17 Pa. St., 96.

Judge Rogers here distinguishes between cases where the grant is in fee for a certain purpose without more, and those where it appears that the estate ends when the use is abandoned. So a grant to a congregation "for the benefit, use, and behoof of the poor of said * * * congregation * * * forever," and "for a place to erect a house of religious worship for the use and service of said congregation, and if occasion require a place to bury their dead" (Brendle *vs.* German Reformed Congregation, 33 Pa., 415), was held to pass a fee simple.

These cases obviously have no application to the present case.

It is unnecessary to add that decisions are not pertinent which relate to the construction of deeds upon mere recitals that the grant is upon a certain consideration, or

where the covenants are collateral or in another instrument. As in—

Cook *vs.* Trimble, 9 Watts, 15;
Union Canal Co. *vs.* Young, 1 Watts, 410;
Perry *vs.* Scott, 51 Pa. St., 119;
Church *vs.* Pub. Ground Co., 103 Pa. St., 608.

This case differs also from the cases where a fee is vested in trustees without limitation, and then a purpose is suggested, either collaterally or in other than the granting clause of the deed, as in Barr *vs.* Weld, 24 Pa. St., 84, where a conveyance was to trustees and to their successors forever in trust for the district formerly called Utica School District, without even a direction to erect a school upon it.

Every case cited by the Court of Appeals is either one of dedication wherein the trust is sought to be enforced, or goes simply to the point, that a grant in trust for a specified purpose, without more, does not of itself raise a technical condition—that such form of grant does not so negative other uses as to raise a conditional fee—that the grant is construed as a covenant or as a mere recital of purposes, and particularly so in case of charitable uses.

Taking the cases cited by the learned judge of the Court of Appeals in his opinion in their order:—

In Wright *vs.* Linn, 9 Pa., 433, the gift was to trustees to erect a school for the perpetual use of parties and the inhabitants who might reside nearer this school than any other.

In McKissick *vs.* Pickle, 16 Pa., 140, the grant was to trustees for a school or church with an express clause of re-entry. This right of re-entry was strictly construed, but that it created a conditional estate was expressly admitted.

In Griffith *vs.* Cope, 17 Pa., 96, the grant was to a religious body to build a meeting house upon.

In Barr *vs.* Weld, 24 Pa., 84, the grant was to trustees in trust for a school district without even a direction to build a school house upon the land.

*In re* Mercer Home, 162 Pa., 232, a devise of property providing that no part should be disposed of for any other use than as a home, it was held not to prevent a sale of a small portion where the funds were to be used for the same purpose, the court especially distinguishing that case from this line of cases in its opinion by saying:—

"Nothing short of a plain, unequivocal direction that no part of the land shall be parted with for any purpose whatever ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control required of them."

But on the other hand, as between the grantor and the grantee, when to the purpose specified in the grant there is expressly superadded the condition that the grant shall be "*for no other use, intent, or purpose whatsoever,*" then technical words of condition *are* used and a conditional estate is created by the grant, such construction being a rule of property in Pennsylvania.

Kirk *vs.* King, 3 Pa., 436;
Scheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa., 613;
Slegle *vs.* Lauer, 148 Pa., 244.

In Church *vs.* Grant, 1 Lead. Cases Am. Law, Real Property, page 173, Bigelow, J., says:—

"There is a further distinction in the nature of estates on condition. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect is reserved to the grantor and his heirs only, which gives them the right to enter as of their old estate upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate."

And such possibility of reverter passes to the grantor's heirs.

Scheetz *vs.* Fitzwater, 5 Pa. St., 245.

It is strongly urged upon the court that the effect of the decision of the Circuit Court of Appeals here will be to unsettle titles in Pennsylvania and produce a conflict between the Federal and the State courts as to a rule in the law of real property wherein the Federal courts have always followed the *lex loci rei sitæ*.

The rule in Pennsylvania that conveyances for particular purposes and *for no other purposes* create conditional estates, is not peculiar to that State.. In other States the same rule has been applied, and applied to cases of conveyances for charitable uses.

NEW HAMPSHIRE.

In Wood *vs.* Cheshire, 32 N. H., 421.

The heirs at law of a grantor sued out a writ of entry to recover premises granted for the purpose of erecting *a court house* thereon *and for no other purpose*, to have and hold the said premises "so long as the building thereon is occupied as a court house and no longer." There was no clause of re-entry in the deed. The court held that the estate was an estate upon a conditional limitation, and that as the lot had been abandoned the writ might be maintained.

MASSACHUSETTS.

In Esterbrook *vs.* Tillinghast, 5 Gray, 21.

Where a devise was made to defendant in trust that he and his successors should appropriate the income of the devised property to support the Gospel in a church at Swanzea of a certain faith so long as the members of said church should maintain the visibility of the church in such faith, the heirs of the devisor filed a bill for the recovery of the property, alleging that the visibility had not been maintained, and that by the statutes of Massachusetts the property was revested in them as heirs at law of the devisor, to which bill a demurrer was filed which the court subsequently overruled, Metcalf, J., saying:—

"He (the trustee) holds the property since the failure of

the trust by the extinction of the *cestui que trust* not for his own benefit, but for the devisor's heirs at law as a resulting trust."

NEW YORK.

In *Stuyvesant* vs. *The Mayor of New York City, 11 Paige, Ct., 427*, the same doctrine was applied where land was granted to New York City "upon the express condition that such lands shall at all times and forever thereafter be appropriated to and used for the purposes of a public square." Here the intention was clear that the purpose for which the land was granted was for a square only. *Held*, a condition, and that the grantor might file a bill to enforce the grant or enter for condition broken.

CONNECTICUT.

In Scovill *vs.* McMahon, 62 Conn., 378.

Where a conveyance contained a clause providing that the land should be used for a cemetery and for no other purpose, the court held that the conveyance was upon a condition subsequent.

MARYLAND.

In Reed *et al. vs.* Stauffer, 56 Md., 237 (1881).

A conveyance was made to trustees as a burial ground. "In trust nevertheless, and for the uses, intents, and purposes hereinafter mentioned and to and *for no other use*, intent, and purpose whatsoever." Two bills in equity were filed, one by the trustée for specific performance of the conveyance and one by the heirs at law of the grantor, alleging that the property could not be used for a burial ground, being within the limits of the city, and asking to have the property reconveyed to them. The court held that the lot might still be used as a burial ground, but that it must be in strict conformity with the terms of the deed, as any diversion from those uses would reinvest the grantor's heirs with the title.

In 2nd Universalist Society *vs.* Dugan, 65 Md., 460.

Which was a bill for specific performance of a contract for the sale of land, where the defendant alleged that the plaintiff who held title as trustees for the use of the Quakers about Baltimore and to and for no other use, intent, and purpose whatsoever, could not make a good title, the bill was dismissed. Irving, J.: The uses are clearly and distinctly set forth, and in one of them (speaking of the deed) the words, "and for no other use whatsoever," are added, thereby expressly excluding the idea that a larger estate was intended to be granted.

INDIANA.

In Scott *vs.* Stipe, 12 Ind., 74.

In a grant to trustees of a certain church for the erection of a church, to be forever thereafter used as a house of worship, and the church conveyed the land in fee, the heirs of the grantor commenced an action to recover the land, and it was held that the trustees had no power to sell the lot. Perkins, J.: "The misappropriation of the property granted—its diversion to secular uses—was a breach of the condition, and the breach of the condition worked a forfeiture of the estate and rendered it subject to be recovered back by the grantor or his heirs in a suit at law or in equity. The condition broken gave the right of re-entry."

In The I. P. & C. R. R. Co. *vs.* Hood, 66 Ind., 581.

Where land was conveyed to the railroad company "for and in consideration of the permanent location and construction of a depot for said railroad thereon," and the depot was constructed upon said property, but subsequently removed, it was held in a suit by the heirs of the grantor that the removal constituted a breach of the implied condition subsequent contained in the deed, and that the real estate therefore reverted to the grantor.

ILLINOIS.

In Mott *vs.* Danville Seminary, 129 Ill., 405.

Where a conveyance was made to trustees for building and maintaining on the ground an institution of learning,

as provided by the Act of 1849, it was held that the deed was made upon a condition subsequent that the board should maintain upon the land an institution of learning, and that the land did not revest in the grantor or his heirs until election by them, shown by re-entry or some equivalent act.

In none of the above cases were there clauses of re-entry.

See also—

O'Brien *vs.* Wetherill, 14 Kan., 616;
Cowell *vs.* Springs Co., 3 Col., 82;
Collins Co. *vs.* Marcy, 25 Conn., 242;
Plumb *vs.* Tubbs, 44 N. Y., 442;
Cowell *vs.* Springs Co., 100 U. S., 55.

The learned judge of the Court of Appeals does not cite any case, whether for charitable purposes or otherwise, wherein the words in the present *habendum* were used in which a contrary doctrine was asserted. We may presume such cases do not exist.

## II.

**This rule of construction applies equally whether the conveyance is or is not to trustees or to a charity.**

The court below seemed to consider that because the conveyance was to trustees the ordinary rule of construction was altered. It is submitted that no such distinction exists. There is no reason for such distinction. The *grantor's* reserved estate is the same whether the conveyance is to A. for his own use, for a specified purpose and for no other, or for the use of some one else for a specified purpose and for no other. In both cases the legal estate is in A., and the legal reservation to the grantor is the

same. The words creating the condition are the same in either case. Hence the construction is the same.

The court below ignored the fact that the question at issue was the *grantor's* estate. It determined the question on doctrines solely applicable between trustee and *cestui que trust* in cases where the trustee improperly diverts the subject matter of the trust against the declared wishes of the *cestui que trust*.

Kirk *vs.* King, 3 Penna. St., 441, was the case of an equitable estate, for the conveyance, being to an unincorporated association, was void at law.

In *McKissick* vs. *Pickle*, *16 Penna. St., 140*, a conveyance to certain persons, their heirs and assigns, *in trust* for the use of a school house, provided that if at any time thereafter the premises should be converted to any other use the lot should revert to the grantor and his heirs.

Here an express trust created in fee was held qualified by the *habendum* into an estate upon condition.

So in the second appeal of the case of McKissick *vs.* Pickle, 21 Penna., *232*, the Supreme Court held that if the jury found that the trustees had for seven years permitted the property to be used as a dwelling house, their conditional estate was determined and the grantor was entitled to recover for condition broken.

In Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a base fee, which terminated when the premises ceased to be used for the specified purpose.

The Court of Appeals decided that a gift to build a court house is a gift for charitable uses; that no conditional estate can be created where the land is to be devoted to charitable purposes, and that as there is no express clause in the deed reserving a right of entry, the grantor cannot take advantage of breach of condition. In other words, the court below decided that when the donee was a charity, the donor could not limit the extent of his gift, but must give an unconditional estate, and hence that, *as against the grantors and his heirs*, a charity can with

impunity violate a condition imposed by the grantor, although such condition would be binding against an individual donee.

It may be remarked that while a gift for the purpose of a court house may, perhaps, in a certain measure, be regarded as a charitable use, it is certainly not a charity in the broad sense of the word. Neither is a jail. Both are classed together in the Tax Acts, and are not exempted from taxation as being charities, but as being "public property used for public purposes."

But the question whether a court house is or is not a charity is wholly foreign to the present case. The question here presented is, does the grant create a conditional estate as between grantor and grantee? The construction of the words of the grant will be precisely the same whether the grantees hold for charitable uses or not. A grant of a conditional estate may be made to any one and for any lawful purpose, and it is immaterial whether the grantees take as trustees or in their own right; whether they take for a charity or for private ends; whether they take for public or for individual purposes.

A grantor has a perfect right to say that he will voluntarily give his property for a particular charitable use and for no other purpose, and that the land shall revert to him if that particular use is discontinued. The sole question in such case is, has the grantor so declared by the instrument containing his gift? The language of the present grant by the Pennsylvania rule of real property construction expressly so declares. Hence the question in the present case is, do words which would undoubtedly create a conditional estate when applied to a grant for general purposes fail of their effect and bear some other construction because the grant is for a particular charitable or *quasi* charitable purpose? It is submitted that if the words used create a conditional estate, as they have always hitherto been decided to do, it is immaterial for what purpose the grantees are to hold the property. The distinction is accurately drawn in Barr *vs.* Weld, 24 Pa., 86, where there were no words creating a condition.

So the cases previously referred to in other States, wherein the conveyances were to trustees for certain charitable uses and *for no other purpose*, were similar cases of trusts for charities.

Wood *vs.* Cheshire, 32 New Hamp., 421 (Court House);
Esterbrook *vs.* Tillinghast, 5 Gray (Mass.), 21 (Church);
Stuyvesant *vs.* Mayor, 11 Paige (New York), 427 (Public Square);
Universalist Society *vs.* Dugan, 65 Md., 460 (Religious uses);
Scott *vs.* Snipe, 12 Ind., 74 (Church);

Moreover, in Pennsylvania conditional estates and rights of entry for breach thereof exist without the reservation of specific clauses of entry.

Kirk *vs.* King, 3 Pa. St., 436;
Sheetz *vs.* Fitzwater, 5 Pa. St., 126;
Church *vs.* Public Ground Co., 103 Pa. St., 608;
Courtney *vs.* Kellar, 4 Pennypacker, 38;
Slegle *vs.* Lauer, 148 Pa. St., 236.

The defendants in error in their brief in the court below stated that Kirk *vs.* King, 3 Pa. St., 436, was overruled by Wright *vs.* Lind, 9 Pa. St., 433. This is an error. A reference to the decisions themselves proves the contrary, and upon the point of construction of the words of grant, Kirk *vs.* King has always been recognized as sound law, even as late as 1892. See—

Methodist Church *vs.* Public Ground Co., 103 Pa. St., at page 613;
Slegle *vs.* Lauer, 148 Pa. St., at page 244.

Moreover, in the present case the trustees were in reality the county, and by Act of Assembly of 1834 the title was expressly vested in the county.

Act of 15th April, 1834, P. L., 538, sections 3 and 9; 1 Purdon (12th ed.), page 436, pl. 12-18.

The condition was broken after the trustees' title had ceased, and when there was no equitable estate. The object of the original appointment of trustees was because the county did not possess the corporate power of holding real estate in its own name. In early times counties had not full corporate powers, and in Pennsylvania, as in other States, all titles for the counties were taken by trustees; thus was title taken to Independence Square in Philadelphia and all court houses and prisons in Pennsylvania. See Act 18th February, 1780, 1 Smith's Laws, 484.

In speaking of the title thus taken by trustees, Ch. J. Shaw, in

*Atty. Gen.* vs. *Federal St. Meeting, 3 Gray (Mass.), 1*, a case much like this, says: "Supposing, then, that most of the old societies of Boston were formed by association without any acts of incorporation, and there being no other body capable in law of taking and holding the fee and legal estate of the land to be used for a church edifice and its incidents, the natural expedient would present itself, when an agreement had been made by an unincorporated body of persons associated together to form a new religious society with the owner of the land for its purchase to take a deed to and for the use and benefit of the whole in the names of a few, who in their natural capacity could take and hold the legal estate in fee in trust for those who had thus associated to form such a society, and who had raised the money for that purpose. In such case the trustees would hold nearly the same relation to the pew holders, the contributors, and members of the society so associated as the corporation, whether of a territorial or poll parish, would hold to the members: the legal estate would be in the trustees, and the entire use and beneficial interest in the members of the society."

In that case the grant was to trustees, without words of inheritance, for the benefit of a congregation (according to the tenures of the Church of Scotland), to hold and enjoy the lands whereon the meeting houses are erected forever, and for no other use, intent, or purpose whatsoever.

*Held, First.*—As the trustees needed a fee, that such was granted.

*Second.*—That the trust changed by the change of form of worship of the congregation.

*Third.*—That as between the trustees and the congregation, after an occupation of forty years, the title was in the congregation.

In *Brendle* vs. *Congregation, 33 Pa. St., 415*, where a gift was to trustees "in trust for a place to erect a church and for a burial ground," it was held to vest an executed legal estate in the congregation itself.

LOWRIE, Ch. J.: "The use of the medium of trustees was mere matter of form, and does not at all make this case a charitable use. Such trustees seldom, if ever, convey to successors, but title in their name is treated as title of the congregation, to be used by the congregation at their discretion, as the law allows."

It was to obviate doubt as to the *status* of the estate of the county in such grants that the provisions of the Act of 1834 were suggested by the revisers of the Civil Code of Pennsylvania, who in their third report, dated December 31st, 1832, page 5, stated: "Whether they constitute a corporation remains unsettled as a general question. * * * We think that it will be found advantageous to declare every county and township a body corporate for certain purposes." And to effect this the revisers suggested the Act of 1834 which was subsequently passed by the legislature, as suggested by the revisers, and is as follows:—

"The titles to all and singular the court houses, jails, prisons, and workhouses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby de-

clared to be, vested in the respective counties for the use of the people thereof, and for no other use."

Act 15th April, 1834, section 9, P. L., 538; 1 Purdon's Digest (12th ed.), page 436, pl. 18.

In the present case the grant was as much to the county as it was possible to make it, and if the county had been capable of taking, and the grant had been to it, for the use of a court house and no other use, it would have been a condition. Can it be less if to a trustee in trust for such use?

But the question does not really arise. For the condition was violated and the land diverted to other uses by the county itself while holding the legal title long after the trustees' title had been abolished and the equitable estate merged into the legal title.

Hence the learned judge ruled the case upon an immaterial point, for at the time of condition broken no trust existed.

Again, from another standpoint, the same result is reached.

It is a familiar and universal rule of construction that a trustee's title "is commensurate in duration with the purpose to be answered by it."

Kirk *vs.* King, 3 Pa. St., 441.

Or, as stated in Perry on Trusts:—

"The general rule is that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more and no less. Courts will abridge the estate where words of inheritance are used if the execution of the trust does not require a fee, and so they will enlarge the estate if no words of inheritance are used in a deed."

1 Perry on Trusts, section 320 (citing many cases).

So, again, in 1 Perry on Trusts, section 312, the same principle is thus stated:—

"The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the

deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts: First, 'whenever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not;' and second, '*Although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires.*'"

1 Perry on Trusts, section 312 (citing many cases).

So in Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was made to trustees and their successors in trust to build a church "for the members of the Methodist Church, so long as they use it and no longer, and then to return back to the original owner;" and it was held that the trustees' estate terminated when the house ceased to be used as a place of worship according to the discipline of the Church.

In the present case the purpose to be answered by the trust is the use of the land for the use of a court house "for the public use and service of the said county and to and for no other use intent or purpose whatever" That use has now definitely determined. For over thirty years the land has been abandoned for any such use. The court house building thereon erected has been torn down, removed, and permanently erected in another place. The purpose to be answered by the trustees' estate has ceased. Hence the trustees' estate also ceases.

Therefore, whether we consider the case as one of the *quantum* of the estate of the trustees, or as one of the *quantum* of the grantor's reservation, the same conclusion

results. In either case the heirs of the grantor are entitled to recover.

The defendants in their brief below argued that this action was barred by the Statute of Limitations, but the law is well settled in Pennsylvania that where parties enter by deed as here, no statute will run until some unequivocal act is done by the tenant severing the tenancy, which act must be communicated to the landlord.

Cadwalader *vs.* App., 81 Pa., 194.

Here defendant not having offered testimony, there is no evidence of severance, nor in fact was there any such severance.

Moreover, there are several reasons why the Statute of Limitations will not apply:—

1. The plaintiff's right did not vest until the death of the prior tenant, Thomas Gordon Penn. He died September 10th, 1869; see Pedigree, Record, page 22. [He was, moreover, a lunatic duly so adjudged under inquisition proceedings. This does not appear of record, as these points now raised by defendant were not made in the court below.]

The re-entry was made July 25th, 1888, and the action commenced July 26th, 1888.

The Statute of Limitations does not run against a remainderman until the right of entry accrues.

2 Wood on Limitations, page 639, and note 6; page 640, note 1.

The reason of the delay was, that the plaintiff in error lived abroad and never heard of the action of the grantees until immediately prior to his entry and action.

2. At common law entry prior to action was essential to recover for breach of condition in conditional estates. Such entry is not barred by lapse of time, and the Statute of Limitations does not run until entry made, as then and not before the cause of action accrues. This has been altered by statute in some States, but not in Pennsylvania.

Watters *vs.* Bredin, 70 Pa. St., 235, where the Su-

preme Court reversed, because proof of re-entry was excluded in the court below.

"When a breach of condition occurs the grantor or his heirs acquire a right to enter. If they do not exercise it they acquire no title and that right of entry cannot be assigned or devised. Until after entry, therefore, they have no interest in the estate. * * * By the common law the grantor or heirs must enter for breach to acquire seisin."

See article "Estates upon Conditions," 1 American Law Review, 267;

Tallman *vs.* Snow, 35 Maine, 342;
Buhhard *vs.* Hubbard, 97 Mass., 188;
Phelps *vs.* Cresson, 12 Iredell (N. C.), 194;
Bowen *vs.* Bowen, 18 Conn., 535;
Stearns *vs.* Harris, 8 Allen, 598.

"But when an estate is, strictly speaking, upon condition in deed * * * the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of condition and make either an entry or a claim in order to avoid the estate."

2 Blackstone's Com., 155;
Littleton, sections 3-47;
Coke on Littleton, 244 *b*.

3. The Statute of Limitations does not run against the proprietaries under the law of Pennsylvania, for under the charter of Pennsylvania the proprietaries were substituted for the king, and their proprietary rights and estates were expressly preserved to them by the Divesting Act, and are equal to those of the Commonwealth.

Kirk *vs.* Smith, 9 Wheaton, 241;
Penn's Lessee *vs.* Kline, 4 Dallas, 402;
Hilton *vs.* Brown, 1 Washington Circuit Court Report, 204.

4. The right of entry existed until sufficient length of time had elapsed to presume a final abandonment of the

use. It has been decided that seven years would be sufficient wherein to presume abandonment, but so far as we are aware no less date has been judicially so construed. The entry and action were brought within twenty years after the expiration of such seven years' presumption.

Again, defendant argued in the court below that the court house having once been erected on the land, such erection is a sufficient compliance with the condition, and that they can now use the land for any other purpose they deem desirable.

This is distinctly negatived by the terms of the grant. It is to be for "no other use, intent, or purpose whatsoever." Under the defendants in error's construction they can sell the land, or rent it, or divert it to such purpose of pecuniary profit as they may deem desirable. Under their contention, the erection need be but for a year or a day—any temporary building used for a brief space of time for court-house purposes would suffice to enable them to sell and make a pecuniary profit out of a gift limited to a specific use. This is opposed to the plain intent of the conveyance, and as matter of law the gift to erect and to use for no other purpose implies a condition to maintain. Thus in Kirk *vs.* King, 3 Pa. St., 436, where the conveyance was for an English school house and for no other purpose, the court said, page 441: "The grant itself was consequently on an implied condition or agreement that the school should be kept up."

So in Courtney *vs.* Keller, 4 Pennypacker, 38 (Supreme Court of Pennsylvania, November, 1884), a conveyance was made containing the following provision:—

"The above-described lot is for the use of a public school known as School No. 6, in Ohio Township, and it is further agreed by the above-named parties that in case the school law now in existence should be abolished and the public school cease to exist, then the above-recited lot shall revert back to the parties of the first part, their heirs and assigns." The school house was built upon the said lot, maintained there for fourteen years, and then a part of the building removed to a new lot, and the re-

mainder fitted up as a dwelling house and rented, the money being used to support the school.

Upon ejectment brought by the heirs of the grantors, the Supreme Court held that the conveyance was upon condition and that the abandonment of the use of the property was a breach of the condition, and said:—

"The lot is for the use of a public school, known as No. 6, in Ohio Township, and as public schools are not ordinarily maintained by rents from property owned by them, but by public taxes, we may take it for granted that the design of the deed was not to enable the directors to obtain a revenue by building dwellings upon the lot and renting them to their janitor and others, but that the intention of the parties was fully interpreted and fulfilled when the school house was erected thereon; but clearly if there had been no use of the lot for such purposes the right could never have attached, and so from the character of the grant itself, *without reference to the condition, when there was an abandonment of the use the right ceased.* * * * The district wanted a place for a public school house, and Margaret Courtney was willing that her lot should be used for that purpose but for no other. * * * If they choose to withdraw the school and abandon the use to which they were limited their right fell, of course, *and they could not claim the premises for a purpose not found in their deed.*"

Moreover, the construction for which we contend has been hitherto concurred in by the defendants. In 1703 a conveyance, similar to the one now in controversy, was made by Richard and Thomas Penn. It was to trustees in trust for the county defendant for the purposes of a prison, "and for no other use whatever." (See Exhibit No. 11, Record, page 27.) The use of the lot for prison purposes was discontinued, and the county desired to acquire the fee simple, so that they could use the property for other purposes. Accordingly, in 1852, the county defendant bought from Granville and Richard Penn (the then heirs at law of the Penns), for a valuable consideration, their reversionary interest in the property,

by deed reciting that "The county of Northampton is desirous of becoming the owners of the said lot of ground, with the appurtenances, in fee simple, to be by them occupied and enjoyed for all and every purpose whatsoever they may deem proper, and at pleasure to sell and convey the same free from all and every restriction, estate, and incumbrance whatever." If, as the defendants now contend, they are entitled under a similar conveyance to use the property for any purpose they may deem proper, and if, as they contend, the plaintiff has no reserved estate under such conveyance, why did the defendants purchase such title in 1852 from the plaintiff's ancestor, and recite that otherwise the property could not be perverted to other uses? This was a construction directly by the parties themselves of a similar conveyance under identical facts.

Evidence of these facts was offered at the trial, but rejected by the learned judge, and exceptions duly taken. The rejection of this evidence is embraced in the fourth and fifth assignments of error.

It is submitted that the foregoing practically covers the entire case. Other matters were urged at the trial, but were ruled in favor of the plaintiff in error, and hence need not be referred to here. The attention of the court, however, is called to one other matter, viz.:—

The land in question was one of the proprietary rights or manors of the Penns, and their rights in such property were expressly preserved to them by section 8 of the Act vesting the title to the Province of Pennsylvania in the Commonwealth, passed November 27th, 1779 (1 Smith's Laws, 479), wherein it is provided "That all and every the private estates, lands, and hereditaments of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase, or descent, and likewise all the lands called and known by the name of the proprietaries, tenths, or manors, which were duly surveyed and returned into the land office on or before the fourth

day of July, in the year of our Lord, 1776, * * * or any parts thereof which have been sold, be confirmed, ratified, and established forever, according to such estate or estates therein and under such limitations, uses, and trusts as in and by the several and respective reservations, grants, and conveyances thereof are directed and appointed."

The plaintiff offered evidence that the premises in question had been duly surveyed in 1736 and entered in the book of proprietary rights. This evidence was duly admitted by the court. (See Record, page 10; also Exhibits No. 7 and 8, Record, pages 25, 26.)

The plaintiff further offered cumulative evidence upon the point that the present property was part of the private estate of the manors or proprietaries confirmed to the Penns, and for this purpose offered other certificates from the book of proprietary rights, and certified plans embracing the lot in question, and also deeds from the Penns subsequent to the Divesting Act. (See Exhibits Nos. 9, 10, and 13, Record, pages 27 and 31.) These were rejected by the court, presumably as being merely cumulative.

It is submitted, however, that the plaintiff in error had the right to submit all his evidence upon this point, whether cumulative or otherwise. This is embraced in the sixth and seventh assignments of error.

C. BERKELEY TAYLOR,
A. T. FREEDLEY,
WM. BROOKE RAWLE,
*For Plaintiff in Error.*

Since the decision of this case by the court below, the following article (with which the counsel in this case had no connection) has appeared in the American Law Register for June, 1896, vol. XXXV., N. S., page 402, and which is annexed as part of this brief:—

"Reverter of Land Granted for Special Purpose. *Stuart* vs. *City of Easton and County of Northampton*, June, 1896 (not yet reported), United States Circuit Court of Appeals for Third District.

"In 1764, Thomas Penn and Richard Penn conveyed 'a lot of ground unto AB. *et al.*, their heirs and assigns forever in trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county *and to and for no other use intent or purpose whatsoever*' The patent contains no punctuation. These trustees had been authorized in 1752 by an Act of Assembly 'to take assurances of a piece of land for the use of the inhabitants of said county, and thereon to erect a court house and prison,' &c.

"By virtue of an Act of Assembly of 1834 (P. L., 538), the title of the trustees became vested in the county of Northampton. A court house was erected upon the ground and remained there until 1862, when it was removed, and no other buildings have been erected thereon since. In 1888, the heir at law of the Penns made entry for breach of condition, and brought ejectment. The question arises, Does the patent of 1764 convey a fee simple absolute or an estate upon condition, a base fee?

"The learned court evaded this question by separately construing the premises and the *habendum:* 'The succeeding words in trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent, or purpose whatsoever, defined the relation between the grantees and the inhabitants of the county, and restrained the grantees from any other application of the property than to the avowed object of the grant.'

"Surely this is a strained construction; in none of the cases cited has it been even suggested. The court con-

tinues: 'In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate, determinable by re-entry upon nonuser, was intended?' After the above disposition of a stipulation, which, in Pennsylvania, whose decisions the court is bound to follow in this case, has always been held to constitute a fee upon condition, the learned judge asks for 'an express stipulation.' The court was of opinion that the grant was a charitable use, and that in the absence of an express provision for a reverter to the grantors in the event of a misuser or nonuser, no right of entry to defeat such use was to be implied. The consideration of that question has no place in the decision of this case.

"It has never been disputed that a man may make such legal disposition of his property as he chooses, and when he has made such conveyance the courts are bound to effectually construe his deed. Fees upon condition have been recognized immemorially.

"It is settled that the mere expression in a conveyance of the purpose of a grant will not, of itself, create a condition: *Kerlin* vs. *Campbell*, 15 Pa., 500 (1850); *Seebold* vs. *Shitler*, 34 Pa., 133 (1859). A base fee may be created without the usual technical words, *sub conditione*, *proviso*, *ita quod*: *Church* vs. *Ground Co.*, 103 Pa., 613 (1883). Nor is an express stipulation that, upon breach of condition, the grantor may re-enter, necessary; it is implied as part of the grant: IV. Kent Com., 123; *Gray* vs. *Blanchard*, 8 Pick., 284; *Osgood* vs. *Abbott*, 58 Me., 80. Where conveyances in fee simple, stating the purpose of the grant, were made, with the superadded words, 'and for no other use whatsoever' (*Sheetz* vs. *Fitzwater*, 5 Pa., 126 (1847); 2 L. C. Am. R. P., 13), 'and no other purpose' (*Kirk* vs. *King*, 3 Pa., 436 (1846); *Crane* vs. *Hyde*, 135 Mass., 147), it was held that base fees were granted. In *Kirk* vs. *King* the conveyance was to a trustee. And as recently as 1892, in *Siegel* vs. *Lauer*, 148 Pa., 244, the Supreme Court, in a two line *per curiam* opinion, adopted the exhaustive opinion of Endlich, J., where a conveyance made to county commissioners for a specific purpose, without superadded

words, was held to convey a fee upon condition, the use for the particular purpose constituting part of the consideration for the grant. The learned judge, in this case, said: 'But, where an estate is conveyed for a specific purpose, "and no other," the fee is a fee upon condition, determinable upon cessation of the use of the property for that purpose: *Kirk* vs. *King* (*supra*); *Sheetz* vs. *Fitzwater* (*supra*); *a fortiori* should the words "*to and for no other use intent or purpose whatsoever*" constitute a fee upon condition.'

"Agreeing with the learned judge that a grant for such a purpose might be a charitable use, it is submitted that the premises for such conclusion are wanting here. The conveyance to the trustees authorized by Act of Assembly to receive such assurances was, in the language of Lowrie, C. J., in construing a similar deed to trustees in trust for a church congregation, 'mere matter of form,' and does not at all make this case a charitable use: *Brendle* vs. *Congregation*, 33 Pa., 415 (1858). In that case the deed was held to vest an executed legal estate in the congregation. Moreover, in 1834, the trustees' title became vested in the county, and during its tenure of the qualified fee simple estate the breach of condition occurred. When the specified purpose of the grant ceases, the estate of the trustees cease: *McKissick* vs. *Pickle*, 21 Pa., 232 (1853); *Henderson* vs. *Hunter*, 59 Pa., 335 (1868). In the latter case the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a fee upon condition, which terminated when the premises ceased to be used for the specified purpose. The same conclusion was reached in *Siegel* vs. *Lauer* (*supra*), where the conveyance in 1772 was to the commissioners, to and for the use, &c. Neither upon principle nor upon authority does the learned court's conclusion seem tenable.

"[It is a curious fact that in 1852, when these defendants removed from a lot granted by a similar patent for a prison, 'and for no other use whatever,' they purchased from the three heirs at law of the Penns their reversionary interest in the property.]"

APR 12 1838
JAMES B. McKENNEY,
CLERK

No. 194

Brief

# Supreme Court of the United States

WILLIAM DUGALD STEWART, an alien and subject of the Queen of Great Britain, resident in England,
*Plaintiff in Error.*
*(Plaintiff below.)*

vs.

CITY OF EASTON AND COUNTY OF NORTHAMPTON, corporations incorporated under the laws of the State of Pennsylvania, and CITIZENS of the said State resident in the Eastern District of Pennsylvania,
*Defendants in Error.*

October Term, 1897.

No. 197.

## ARGUMENT FOR DEFENDANTS IN ERROR.

It is sought to convict the Court below of error in its construction of the deed for the property in controversy. The Court below held that it did not create an estate upon condition, but an absolute estate in trust, and one in which the plaintiff had no interest.

The action is in ejectment and therefore the burden rests upon the plaintiff to clearly prove his title. He seeks to do this by offering in evidence deed marked Exhibit No. 4, (transcript of record, page 16), and relying upon the language of the habendum to create an estate upon condition. The habendum is as follows:

"To Have and to Hold the said hereinbefore described lot of ground with the appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse, their heirs and assigns forever. In trust nevertheless to and for the erecting thereon a court house for the public use and service of said county, and to and for no other use, intent or purpose whatsoever, to be holden of us, our heirs and successors, proprietaries of Pennsylvania, as of our manor of Fermor, in the County of Northampton aforesaid, in free and common socage by fealty only, etc." The deed was dated September 28, 1764. The County of Northampton was created by Act of Assembly passed March 11, 1852, (transcript of record, page 9), which authorized certain persons to purchase land in trust to erect a court house thereon, Section 6 of which was as follows, viz: "That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land, situate in some convenient place in the said town, in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison sufficient to accommodate the public service of the said county and for the ease and conveniency of the inhabitants." (See transcript of record, page 14.) The warrant (see page 14 of transcript), which preceded the deed in question and is referred to in the deed, contained the following recital: "Whereas in and by an Act of General Assembly of this province entitled An Act of erecting the northwest part of Bucks into a separate county, which in and by the said Act is called Northampton, and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton, in the said county, and thereon to erect and build a court house and prison sufficient to accommodate the

public service of the said county, and for the ease and convenience of the inhabitants, as in and by the said Act appears. And whereas, on application and request of the said trustees, and out of our regard to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of the said county, we have condescended and agreed to grant the said trustees a lot or piece of ground of eighty feet square to be laid out in the centre of the great square in the middle of the said town of Easton for a court house for the use and the accommodation of the inhabitants of the said town and county forever."

It will be observed that the deed to the trustees follows strictly the language of the Act of Assembly authorizing the trustees to make the purchase, and, so far as the trustees are concerned, it conveys to them a fee simple. It conveys the ground to the trustees by name, "their heirs and assigns forever." The subsequent clause, "In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever," was intended to apply only as between the trustees and the people of the county and not between the Penns and the people of the county. The Penns parted with their entire title, and the language quoted is not a qualification of the estate as granted, but simply limits the uses to which it might be applied in the hands of the trustees. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out. Nor does it reserve to the grantors and their heirs the right in that event to re-enter on the land and resume possession of it as of their former estate. Moreover the purpose declared is in its nature general and public, and not inuring specially to the benefit of the grantor. It simply defines a duty of the trustees to the county, not to their grantors. As between the grantors and the trustees, it conveys a

fee simple, and between the trustees and the people of the county it creates a trust.

"Where the intention is to dedicate property to charitable uses, there is a difference between a conveyance *on condition* and a conveyance in trust. In the first case the grantor and those claiming under him may enter for condition broken. But in the last they cannot, and the proper remedy for an abuse of the trust is an application to the chancery powers of the court for an appointment of new trustees, or the means of compelling those already appointed to execute the trust according to the intention of the donors."

Barr vs. Weld, 24 Pa. St., 86.
Dillon on Mun. Corp., § 653.

Where subsequent conditions are relied on to work a forfeiture, they must be created by express terms or clear implication, and are construed strictly.

2 Washb. on Real Prop., 447.
American & English Ency., Vol. 13, p. 777.

The policy of the law is to render the alienation and transfer of land as free as possible, and conditions are not favored in law. Therefore, whenever words can be construed either as a condition, reservation or covenant, the tendency of the Courts is to construe them as one of the latter, rather than as the former.

Paschall vs. Passmor, 15 Pa. St., 295.
Church vs. Ground Co., 103 Pa. St., 613.

We contend first that the deed was an absolute conveyance to the county.

In construing a deed the Court places itself as nearly as possible in the situation of the contracting parties; and their intent will be ascertained in the same manner as in the case of any other contract. If the intention is not then apparent from the deed, resort is to be had to the rules of construction which give

greater effect to these things about which the law presumes the parties are least liable to make a mistake.

Paschall vs. Passmore, supra.

3 Washb' on Real Prop., 384.

In Seebold vs. Shitler, 34 Pa. St., 133, an Act of Assembly authorized the Commissioners of Union County to purchase a site for a court house, and the habendum of the deed was: "Unto the said Commissioners of Union County and to their successors in office, in trust for the use of the county of Union forever." *Held*, That on the removal of the seat of justice and the discontinuance of the original uses for which the lots were conveyed, they did not revert back to the heirs of the original grantor. See also Kerlin vs. Campbell, 15 Pa. St., 500.

Barr vs. Weld, supra.

In Methodist Church vs. Old Columbia Public Ground Co., 103 Pa. St., 608, a conveyance of a piece of land in fee in trust for the sole use of a company, thereafter to be formed, for supplying a certain borough with water, was held not to constitute a base fee determinable on the cessation of the use of the premises for a reservoir, but that it passed a fee simple. Chief Justice Mercur there said: "Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. It was said by Mr. Chief Justice Bigelow, in Packard, et al. vs. Ames, et al., 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose without other words can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money, or the doing of some act by the grantee, on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. Cook vs.

Trimble, 9 Watts, 15. * * * *The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate.*"

In Wilkes-Barre vs. Wyoming Historical Society, 134 Pa. St., 616, it appeared that by Sec. 5, Act of April 5, 1870, P. L. 891, the borough of Wilkes-Barre was directed to convey to a historical society a lot fronting on a certain street "for the erection of a hall for the use of said society," was held to impose no condition upon the title directed to be conveyed. Mr. Justice Green there said: "As to the use of the lot expressed in the fifth section of the Act, it is only necessary to say that it is not restrictive of the grant, and that the title is not dependent upon a literal compliance with the use expressed. The Act simply says that the lot shall be conveyed to the defendant "for the erection of a hall for the use of said Wyoming Historical and Geological Society.' No condition of any kind was imposed. The passage of the title was not made to depend upon the performance of any terms. No direction was given that a hall should be erected and no penalty of any kind was established, whether by way of reverter of the estate or in any other manner whatever, for the non-erection of the hall. In these circumstances the authorities are uniform and very clear that no conditional estate is given, and the land can be held in fee simple without performance of the consideration or purpose expressed."

See also

Harris vs. Shaw, 13 Ill., 456.
Board vs. Pattenson, 56 Ill., 111.
Ayer vs. Emery, 14 Allen, (Mass.) 67.

"In grants from the crown and in devises a conditional estate may be created by the use of words which disclose that it is given or devised for a certain purpose, but such words do not make a condition when used in deeds of private persons—if one makes a

deed "with the intention or for the purpose," the words must be conjoined with words of forfeiture or clause of re-entry, or the grant will not be conditional."

Rewson vs. School Dist., 7 Allen, (Mass.) 125.

The words "in trust nevertheless and upon condition always" to use the premises for public worship, in a deed of land to a religious society do not necessarily create a condition, but may impart merely a trust.

Sohier vs. Church, 109 Mass., I.
Episcopal Mission vs. Appleton, 117 Mass., 326.

There are, however, no words in the deed to create a condition—neither *proviso, ita quod, sub conditione,* nor any equivalent for these usual if not indispensable words.

Perry vs. Scott, 51 Pa. St., 124.
Paschall vs. Passmore, 15 Pa. St., 295.

The plaintiff in error contends that where a grant is made for a particular use with the words "for no other purpose whatsoever" superadded, an estate upon condition is created. But passing the question whether they are sufficient in themselves to create a condition, they are in no way connected with the grant so as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. Here the conveyance was to the trustees, "their heirs and assigns forever," the usual words used to grant a fee. The words "for no other purpose whatsoever" are not used in connection with the grant, nor do they in any way qualify it, but they are simply used to declare the uses for which the trustees should hold the fee previously granted. It was not intended to prevent its use or alienation for general purposes, but simply to prevent the trustees from using the land for individual purposes. It defines a duty of the trustees to the county, not to their grantors. Thus, in Griffits vs. Cope, 17 Pa. St., 96, a devise of land in fee, "there to build a meeting house upon, if the

members of that meeting shall agree to build a meeting house there, *but not else.*" The land was conveyed and the meeting house erected and used for more than a century. A new meeting house was then erected on other ground and the old one disused under a vote of the meeting and sold, but the sale was never consummated. Held, 1st. The devise was of a fee simple and not a qualified estate. 2d. That the trustees could sell and convey.

The Court there said: "There is a very palpable distinction between a gift of land from motives of charity and a dedication of land to charitable uses; and there are most intrusive reasons giving a judicial bias in favor of satisfying the motive without establishing a perpetual dedication.

"Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation. And it seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such cases, except when he says so; or that amidst the rapidly changing opinions of society, he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society, or that he means that no change in the number, circumstances and habits of the people shall ever justify any sort of conversion of the gift.

"It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied. * * * * * * * *

"These grants are as between the grantor and grantees fees simple, and as between the trustees and beneficiaries they are trusts."

See also Brendle vs. Church, 33 Pa. St., 415.

The distinction between the cases relied upon by the plaintiff in error and the facts of the present case is apparent upon the surface. Thus, in Kirk vs. King, 3 Pa. St., 436, the operative words of the grant did not convey a fee, but the grant was expressly stated to be "for an English school house and no other purpose." And this case was overruled in Wright vs. Linn, 9 Pa. St., 433. In Sheetz vs. Fitzwater, 5 Pa. St., 126, a conveyance was made of a mill dam or pond of water and land for the use and service of a certain mill, "and for no other use whatsoever," and the grantor reserved certain rights to himself. In McKissick vs. Pickle, 16 Pa. St., 140, the deed contained an express clause of reversion to the grantor, his heirs and assigns, in the event that the premises should be used for a different purpose than that mentioned. In Henderson vs. Hunter, 59 Pa. St., 335, the language of the grant is "so long as they use it for that purpose and no longer, *and then to return back to the original owner.*" The Court properly holds that this is a *conditional limitation* and not an estate upon condition. A reading of this case demonstrates the necessity of words of forfeiture or re-entry in order to create a condition. All of these cases turned upon a precise limitation contained in the deed, accompanied the creation of the estate, qualified it and prescribed the bounds beyond which it should not exist. Here, however, as already stated, the deed conveys a fee simple to the trustees without any clause so connected with the grant as to qualify or restain it. No restraint was imposed on an alienation of the land. No clause provided for a forfeiture or termination of the estate in case the land ceased to be used for court house purposes. No right of re-entry was reserved by the grantors except the non-payment of quit rent, and the mention of the one cause for re-entry is certainly an exclusion of all other causes. *Expressio unius, exclusio alterius.* No technical words were used equivalent thereto or proper to create a condition. The authorities cited show that the statement of the purpose for which the land is to be used is wholly insuf-

ficient to create a conditional estate. And this statement only had reference to the uses for which it was to be held by the trustees as between them and the people of the county.

In Slegle vs. Lauer, 148 Pa. 244, the Court distinguishes the case of Seebold vs. Shittler, 34 Pa. 137. For the same reason it must distinguish the present case.

In Seebold vs. Shittler, the Act of Assembly directs that a deed in fee simple shall be tendered to the Commissioners for the land which they were authorized to take for a court house, and the Court says that "no conveyance for any less estate or for a limited fee, and confined with conditions or qualifications of any kind, would have fulfilled the requirements of the legislature. A precisely similar state of facts exist in the case at issue. The original act creating the County of Northampton directs the parties therein named to "purchase and take assurance to *them and their heirs* of a piece of land, etc., in trust and for the use of the inhabitants of said county, to erect and build a court house." This authority was exercised by the said Trustees securing the tract of land now in dispute by a deed to *them and their heirs* in trust.

In addition to this, for the purpose of construing the deed of grant, attention is directed to the warrant upon which the deed is based, (Transcript, page 14.) The land is granted to the said trustees "for a court house for the use and accommodation of the inhabitants of the said town and county forever." It will be observed that absolutely no conditional words are here used. It was the intention of the grantor to grant and the grantees to receive a fee simple. The deed or patent is but a confirmation of the warrant and survey. Delaware and Hudson Canal Co. vs. Dunmock, 47 Penn. St., 393.

As already stated, the language of the deed to the trustees followed strictly the language of the Act of Assembly creating the county and which authorized the purchase. By the follow-

ing Act the title to all such property is vested in the county : "The titles to all and singular, the court houses, jails, prisons and work houses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are or heretofore have been, vested in any feoffees or trustees, or in the commonwealth or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to be vested in the respective counties for the use of the people thereof, and for no other use."

Sec. 9, Act of April 15, 1834, Purd. Dig., (12th Ed.) p. 436.

II.

**The deed created a trust in the nature of a charitable use not liable to be defeated by non-user.**

We contend, moreover, that the deed having established a trust it was in the nature of a charitable use not liable to be defeated by *non-user*. The object of that conveyance was the erection of a court house for the public use and service of the people of the County of Northampton. Such a trust is included in the class of charities recognized by the law of Pennsylvania as entitled to especial protection, and not subject to be destroyed for *non-user*. This is the distinction between a conveyance on *condition* and a conveyance in *trust*. In Wright vs. Linn, 9 Pa. St., 438, it was stated that "every kind of legal public benefaction is included in the notion of a charity." Also, "That permanency is not necessary for a charity, and in order to make a conditional grant or a reverter such a condition should either *expressly appear or be unerringly indicated by the circumstances attendant on the gift.*" See also Fire Ins. Patrol vs. Boyd, 120 Pa. St., 624 ; Vidal vs. Girard, 2 How., 192, where the principles of the statute 43 Eliz., Ch. 4, relating to charitable uses were recognized as in force in Pennsylvania. In Att'y Gen'l vs. Hel-

lis, 2 Sim. & S., 67, a bequest of funds for the improvement of a town was held to be a charitable bequest. Sir John Leach said: "It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public or general purposes being within the equity of the statute. Thus a gift to maintain a preaching minister; *a gift to build a sessions house for a county*, etc., have all been held to be charitable uses within the equity of the statute of Elizabeth." In Coggeshall vs. Pelton, 7 Johns, Ch. 292, it was held that a legacy for erecting a town house for transacting town business was a charitable bequest. The case of Wright vs. Linn, supra, and In re. Mercer Home, 162 Pa. St., 232, cited by plaintiff in error for a contrary principle, do not sustain it. In the first named case, a conveyance of land to trustees to erect a school house was held to create a charity which was not divested by non-user for more than seventeen years and a re-entry by the grantor. And in the latter case a devise for a home for disabled clergymen, without any remainder or reversion after the charitable use, was held to pass the fee, and that the heirs of the devisor had no interest, direct or remote, in the property. The deed here in controversy vested a fee in the trustees without limitation, simply naming the trustees, "their heirs and assigns forever, in trust nevertheless for erecting thereon a court house, etc."

In this respect it is identical in principle with Barr vs. Weld,

A conveyance of land to trustees and their successors in office forever in trust for a use which is a charity to continue perpetually, will pass a title in fee simple, notwithstanding the absence from the deed of any words of inheritance.

Such a conveyance for a charatable use does not create a conditional estate, but a trust for the charitable use, not liable to be defeated by non-user or alienation.

Petition of Sellers M. E. Church, 139 Pa., 61.

The doctrine of *cy-pres* is in force in Pennsylvania.

Act May 26, 1876, Purd. Dig., 12th Ed., 302.

## III.

**Forfeiture of condition, if any, was waived, and right of action is barred by statute of limitations.**

In the history of the case in the brief for plaintiff in error it is stated: "Between the years 1763 and 1766 a court house was erected on the lot which was used by the county until 1862, when it was torn down and the place where it stood has since been used as an open square by the City of Easton." The latter part of this statement we deny. Since it has ceased to be used for court house purposes it has been enclosed by an iron fence, a fountain costing several thousand dollars erected thereon, and the same has been in the open, notorious, adverse, continuous and exclusive possession of the City of Easton. In plaintiff's Exhibit No. 6 (transcript record, page 25,) appears the following admissions of fact: "That the Northampton county court house was erected upon said property between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed and no other buildings have been erected thereon since," and that a re-entry was made on behalf of the plaintiff on July 25, 1888. We have, therefore, an admission of record that for twenty-six years after the alleged breach of condition the plaintiff acquiesced in the same. The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition and that he may do this by acts as well as by express agreement is a familiar one. Sharon Iron Co. vs. City of Erie, 41 Pa. St., 341. And in Wilson vs. Guthrie, 2 Grant, 110, a much shorter period was held to be "equivalent to an abandonment of the right of forfeiture."

Admitting, however, that the deed created a condition, and that there was a breach of it, the right of action of the plaintiff

is barred by the statute of limitations. In ejectment, the burden rests upon the plaintiff to show a good and sufficient title, for the defendant is presumed to be the owner until the contrary appears. 2 Troubat & Haly's Practice, § 1860. Here we have the admission that a breach of condition, if any, occurred in 1862, and no entry for breach until 1888. This is too late, for the Pennsylvania Act of Assembly expressly limits such actions to a period of twenty-one years after such right of action accrued.

Sec. 2, Act March 26, 1785, Purd. Dig., 12th, Ed., 1209.

"From henceforth no person or persons whatsoever shall make entry into any manors, lands, tenements or hereditaments after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, nor declare or allege any other seisen or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit so hereafter to be sued, commenced or brought."

1.—Taking up the argument of the plaintiffs on this point—the doctrine of notice—if the estate is one upon condition, then it is determined by a breach of the condition and the right of entry as well as of action begins with such breach. The breach of the alleged condition occurred in the year 1862 by the cessation of the use of the court house and by the demolition of the same. No act of the tenant could be more unequivocal. Neither in Pennsylvania or elsewhere is it necessary for the tenant to give notice of the purpose of such act to the landlord. The title of the plaintiff accrued with the breach of condition, and from that time the statute of limitation began to run. The statute expressly provides that "*no entry shall be made twenty-one years after the right accrued.*"

2.—The plaintiff states, as one of the reasons why the statute of limitations will not apply, that their right did not vest until the death of the prior tenant, Thomas Gordon Penn, in 1869. A sufficient answer to this is that the statute having begun to run in 1862, during the life time of the prior tenant, the running of the statute did not cease by his death, but continued to run, having once inured, until the full twenty-one years had expired, unless prevented by some overt act of the landlord, which did not occur until the entry in 1888.

The right to plead the statute of limitations is a privilege of the defendant in every case. This being an action of ejectment, the statutory plea is "not guilty," under which the defendant can take advantage of the statute of limitations. (Troubat and Haley Practice, Sec. 1854.)

It being admitted in "Exhibit No. 6," which is a part of the plaintiff case, "that the court house was removed in 1862 and no other buildings erected thereon since," the facts were before the Court below and are now properly before this Court upon which it may pass upon the point that the plaintiff's title is barred by the statute of limitations.

The statement of the plaintiff in his brief that "he lived abroad and never heard of the action of the grantees until immediately prior to his entry and action," is no legal answer to the right of the defendant in error to take advantage of the statute. He cannot plead his own laches.

The plaintiff states that the re-entry was made July 25, 1888, and the action commenced July 26, 1888, and then cites an authority that the statute of limitations does not run against a remainderman until the right of entry accrues. The *right of entry* accrued in 1862. The entry itself was not made until 1888. The statute runs against the plaintiff. "The statute of limitations affects by its bar, not only the tenant in tail, but the remainder-

When the right of a tenant in tail of any land or ground rent, to make an entry or distress, or to bring an action to recover the same, shall become barred by reason of the same not having been made or brought within the period limited by law, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred; And whensoever the statute of limitation shall have begun or shall begin to run against the tenant in tail, it shall continue to run against the issue, remainderman or reversioner, unless arrested by the act of the tenant in tail: Provided, that no person shall be barred or affected by force of this act until after the expiration of three years from the date thereof.

Act of 13 April, 1859, Purdon Dig., 1213.

The plaintiff states that the common law rule [illegible] by statute in some States, but not in Pennsylvania." It will be observed that the alleged common law rule, then, has been altered by the above statute in Pennsylvania, and, therefore, his argument upon this point fails.

4.—The plaintiff further contends that the statute of limitations does not run against the proprietaries on the ground that their proprietary rights and estates were expressly preserved to them by the Divesting Act. The section of the Act of 1779, known as the Divesting Act, reserves to the proprietaries their "private estates, lands and hereditaments whereof they were possessed or to which they are entitled in their several right or capacity by devise, purchase or descent, and likewise all the lands called and known by the name of the proprietary tenths or manors which were duly surveyed and returned to the land office before July 4th, 1776, etc."

At the time of the enactment of this act the proprietaries were aliens and it was within the power of the State of Pennsylvania to confiscate all their property, title and interest within the Commonwealth. Instead of so doing, the Legislature, while divesting the proprietaries of public titles, estates, interests,

reserved to them the titles and rights to their private estates or manor lands. Because of this exception and liberal act of the Legislature the claim is now set up that the rights of the proprietaries are equal to the Commonwealth in said manors and private estates, and that therefore the statute of limitations cannot run against the Penns and their heirs.

This cannot be the law. It certainly would not comport with the dignity of the Commonwealth of Pennsylvania that the representatives of private estates should successfully maintain that the Statute of Limitations could not be invoked against them—a doctrine which is the privilege of sovereignty alone.

The estates of the proprietaries are subject to the same laws of property, rules of evidence and general principles of construction which govern all other estates in this commonwealth. If this were not the law, we would have this anomalous condition in the State of Pennsylvania—all the lands granted by the proprietaries and their heirs subject to an entirely different code of law than that applying to other lands in the State.

The plaintiff cites the case of Kirk vs. Smith, 9 Wheaton, (W. S.) 36, in support of his contention. A careful reading of this case warrants a different construction. The syllabus is misleading. Nowhere does the Court hold that the Statute of Limitations does not run against the proprietaries. It constantly maintains a contrary doctrine. The Court held that the statute was not operative in that case, because the land in dispute *was not held adversely* to the title of the Penns, the grantors. For this very reason, however, the statute is applicable to the present controversy. The land in question has been in the open, notorious, continuous and adverse possession of the City of Easton for more than twenty-one years—a fact which is admitted by the entry of the plaintiff and his subsequent ejectment by the defendants, (transcript of record, page 25.) The opinion of John-

son, J., in Kirk vs. Smith, applies in all its force to the present controversy.

In addition to this it is important at this juncture to observe that the land in dispute has not been since 1863, when the court house was removed, in the possession of the County of Northampton, but has been in the adverse possession of the City of Easton. Therefore any contention that a possession cannot be adverse if the defendant's entry was under a title derived from the plaintiff is not applicable.

A county may acquire title in this manner.

Schuylkill, &c., vs. McCreary, 58 Pa. St., 304.

The plaintiff further maintains that the right of entry existed until sufficient length of time had elapsed to presume final abandonment, and that seven years would be sufficient wherein to presume abandonment.

No authority is cited for this contention. The breach of condition is the basis of the right of entry. The statute itself fixes the beginning of the running of the statute as at the time when this right of entry accrued, namely the removal of the court house, which is the alleged breach of condition. We are here confronted with a fact and not with a theory of presumption.

## IV.

**A court house having been erected and used on the ground conveyed was a compliance with condition, if any.**

The language of the deed in question, relied upon to create an estate upon condition, is as follows, viz: "In trust nevertheless, to and for the erecting thereon a court house for the public use and service of said county, etc." Now, it is a fundamental principle that all conditions must be strictly construed. Sharon Iron Works vs. Erie, 41 Pa. St. 341. The following is the rule laid down by Shaw, C. J., in Rawson vs. School Dist., 7

Allen, 125: "Such a condition when relied upon to work a forfeit is to be construed by the Court with great strictness, the demandant shall have his exact legal rights and no more" Admitting, therefore, that the deed did create an estate upon condition, it was complied with by "erecting thereon a court house." There is nothing in the condition that requires the court house to be rebuilt or maintained perpetually upon that particular spot. Such an intention ought to be clearly expressed, and not left to implication. It is admitted that a court house was erected and maintained thereon for a hundred years, but to make the condition perpetual there should be express words to that effect. Thus, in Mead vs. Ballard, 7 Wallace, 290, a condition that a certain institute should be permanently located upon the lands granted, before a certain date was held fulfilled, by the passage before the said date, by the governing body of the institute locating it in accordance with the terms of the deed, followed by building on the same land after the date fixed; and that although the institute was afterwards burned and was re-erected upon grounds other than those granted. Miller, J., in the course of the opinion of the Court, said, adverting to the condition: "Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers were to determine in good faith the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating their building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract. * * * We are of opinion that the testimony shows in any view that can be taken of it that the condition was fully complied with and performed, and with it passed all right of reversion in the grantor or his heirs." And in Griffits vs. Cope, 17 Pa. St. 99, the Court said, in construing a clause sought to be

made a condition: "It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied."

It is scarcely necessary to occupy time and space in discussing the assignments of error to the offers of testimony made at the trial and rejected. No authorities are cited to sustain these offers, and it is submitted that none can be found even looking in that direction. They all relate to tracts of land other than the one now in controversy and therefore could have no possible bearing upon the present proceeding. These offers were properly rejected as collateral to the present inquiry.

The deed in question conformed strictly to the language of the Act of Assembly creating the county, which authorized the trustees to purchase land in fee for court house purposes, to be held by them in trust for the people of the county. It was executed and delivered by the Proprietaries of Pennsylvania, in colonial times, when the country was sparsely settled and when they were pecuniarily interested in enhancing the value of their other lands by the progress and prosperity of the infant colony. After thus securing the benefits of their grant, and after the lapse of a century and a quarter of time, it does seem contrary to public policy to permit this remnant of royalty to control land that ought to be controlled by the present generation. And it is unreasonable to suppose that even the grantors themselves intended that their heirs should get back this land, for they have failed to say so in express language. Such an intention should be clearly expressed and not left to doubtful implication. Bearing in mind the rapid changes in the circumstances, habits, opinions and institutions of our people since this grant was made, the wisdom of that rule of law which discourages the fettering of estates becomes all the more apparent.

AARON GOLDSMITH,
EDW. J. FOX,
*For Defendants in Error.*

# APPENDIX.

## The Opinion of the Circuit Court of Appeals—Third District.

ACHESON, Judge.—This was an action of ejectment by William Dugald Stuart, an alien and subject of the Queen of Great Britain, against the City of Easton and County of Northampton, corporations of the State of Pennsylvania.

The County of Northampton was laid out and erected by an Act of the General Assembly of the Province of Pennsylvania passed the 11th day of March, 1752, (1 Dallas' Laws, 452.) The sixth section of the act provided as follows: "And be it further enacted, that it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs, of a piece of land situate in some convenient place in the said town, (Easton), in trust and for the use of the inhabitants of said county, and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county and for the ease and convenience of the inhabitants."

On the ninth day of July, 1762, Thomas and Richard Penn, the proprietaries of Pennsylvania, caused to be issued a warrant of survey, which, after reciting the above mentioned act, proceeded thus: "And whereas on application and request of said trustees, and out of regard to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of said county, we have condescended and agreed to grant to the said trustees a lot or piece of ground of eighty

feet square to be laid out in the centre of the great square in the middle of the said town of Easton, for a court house for the use and the accommodation of the inhabitants of the said town and county forever;" and the warrant then directed the Surveyor General to survey and lay out the said described lot of ground "for the public use of a court house for the inhabitants of the said town and county."

This warrant having been duly executed and returned into the land office, a patent was issued on the 28th day of September, 1764, by the proprietaries, to the named trustees for said lot. After reciting the Act of Assembly and the warrant of survey, the patent proceeds thus: "Now, know ye, that for the further encouragement and better promoting the public benefit and service of the said town and county, and for and in consideration of the yearly quit-rent (one red rose) hereinafter reserved and of the sum of five shillings to us in hand paid by the said trustees, the receipt whereof is hereby acknowledged, we have given, granted, released, and confirmed, and, by these presents, do give, grant, release and confirm unto the said trustees, John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse, and their heirs, the said lot of ground, situate in the center of the great square in the said town of Easton, containing eighty feet in length north and south, and eighty feet in breadth east and west; . . To have and to hold the said hereinbefore described lot of ground, with the appurtenances, unto the said John Jones, Thomas Armstrong, James Martin John Rinker and Henry Allshouse, their heirs and assigns forever; in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose whatsoever."

By virtue of an Act of Assembly approved April 15, 1834, (P. L, 538) the title of the trustees became vested in the county of Northampton.

The Northampton county court house was erected upon the said lot of ground between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed, and no other buildings have been erected thereon since.

On the 25th day of July, 1888, William Stuart, who was the heir at law of Thomas and Richard Penn, caused an entry to be made on the said lot of ground for breach of the condition subject to which, it is alleged, the lot was granted by the above recited patent, and subsequently he brought this action of ejectment for the recovery of the lot.

William Stuart having died after the commencement of the suit, his son, William Dugald Stuart, who succeeded to all the rights of the said William Stuart in and to lands in Pennsylvania, was substituted as plaintiff.

Under the instructions of the court below there was a verdict for the defendants, and afterwards judgment was entered in their favor.

The position taken by the plaintiff in error is, that the grant of September 28, 1764, by Thomas and Richard Penn to John Jones and others "their heirs and assigns forever, in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose whatsoever," did not pass an estate in fee simple, but only a conditional estate determinable on the cessation of the use of the lot of ground for the designated purpose. Is this a sound view of the conveyance?

It is to be observed, that the deed from the Penns recites as the occasion of the grant the Act of the General Assembly under which, as we have seen, John Jones and others were empowered "to purchase and take assurance to them and their heirs" of a piece of land "in trust and for the use of the inhabitants of said county," and thereon to erect a court house "for the ease and

convenience of the inhabitants." Undoubtedly, the Act of Assembly contemplated the acquisition of an estate in fee simple only, by the appointed trustees. Now, the conveyance by the Penns is to the named persons, "their heirs and assigns forever." The succeeding words, in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent, or purpose whatsoever," define the relation between the grantees and the inhabitants of the county of Northampton, and restrain the grantees from any other application of the property than to the avowed object of the grant. The words of the deed are apt words to pass a fee simple estate as between the grantors and the grantees, and to create a trust as between the grantees and the beneficiaries. There is here no express provision for forfeiting the estate for non-user, nor is any right of re-entry expressly reserved to the grantors or their heirs in the event of the cessation of the use of the lot for the designated purpose. The object of the grant was the public benefit and service of a growing community throughout all future changes in the condition and circumstances of that community, and the purpose of the grant could be subserved best by the conveyance of an absolute estate. In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate determinable by re-entry upon non-user was intended?

In Wright vs. Linn, 9 Pa., 433, where land was conveyed to certain named persons and their successors in trust, to erect a school house for the perpetual use of the parties to the deed and other designated persons, it was held that a charity was created which was not determined by non-user for more than seventeen years after a school house had been erected and used, and a re-entry by the grantor. In McKissick vs. Pickle, 16 Pa., 140, 148, the court declared: "The grant, being for a charity, could not be forfeited for non-user, nor for mis-user, except under an express condition or contract." And the court further said: "The law raises every intendment in favor of a charity against

the grantor or those claiming under him." In Griffiths vs. Cope, 17 Pa., 96, 99, in construing a devise to charitable uses, the court said: "Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation, and it seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such cases, except when he says so. . . . It would seem contrary to public policy to favor a construction that would give to a man, who died a hundred or a thousand years ago, the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied." In Barr vs. Weld, 24 Pa., 84, 87, where a conveyance was "in trust for the Utica school house" the court said: "There is no express condition or contract giving to the grantor or his heirs the right to enter for condition broken or for misuser. He had therefore no right to maintain an ejectment, and the plaintiff claiming under him is in the same predicament." In re Mercer Home, 162 Pa., 232, 238, where a testatrix devised a farm to a charitable use as a home for disabled clergymen, and directed that no part thereof "shall be sold or disposed of, incumbered or applied to any other use or purpose than as a home for disabled clergymen of the Presbyterian faith as above specified," it was held, that, as the testratrix created no remainder or reversion, the charity took an estate in fee simple; that the heirs of the testratrix had no interest direct or remote in the property; and that nothing short of a plain, unequivocal direction that no part of the land should be parted with for any purpose whatsoever, ought to be held sufficient to restrain the managers from doing that which the interest of the charity under their control required of them.

These decisions of the Supreme Court of Pennsylvania are conclusive, we think, against the claim of the plaintiff in error, if as is contended by the defendants, the grant by the Penns was for a charitable use. To the question, then, whether the use

designated in and by the deed of September 28, 1764, is of a charitable nature, we now direct our attention.

Although the statute of 43 Eliz. ch., 4, concerning charitable uses was not adopted by the colony or State of Pennsylvania, still the principles of it as applied by Chancery in England always have obtained here by force of the common law of the State: Witman vs. Lex, 17 Ser. & R., 88. This was clearly shown by Mr. Justice Baldwin, (sitting at circuit in this State) in his learned opinion upon charitable uses in the case of Magill vs. Brown, Brightly's R., 347; 16 Fed. Cas., 408, which arose under the will of Sarah Zane, wherein also he demonstrated, that the whole course of the common law of England, except as modified for special purposes of policy by the statutes of mortmain and superstitious uses, was favorable to charities. And in Ould vs. Washington Hospital for Foundlings, 95 U. S., 303, 309, 311, the Supreme Court of the United States declared, that the statute of 43 Eliz. ch., 4, was purely remedial and ancillary, and that the validity of charitable endowments and the jurisdiction of courts of equity over them do not depend upon that statute.

Now, in Jones vs. Williams, Amb., 651, Lord Camden defined a charity to be, "A gift to a general public use which extends to the poor as well as the rich;" and a bequest of a fund to be applied to water-works for the use of the inhabitants of a town was there recognized as for charitable use. In House vs. Chapman, 4 Ves. Jr., 542, 551, it was held, that a bequest for the improvement of the City of Bath was a charitable bequest. In British Museum vs. White, 2 Sim. & S., 595, a devise to the British Museum was adjudged to be for a charitable use. In Attorney-General vs. Heelis, 2 Sim. & S., 67, 76, where a part of a common was dedicated for paving, lighting, cleansing, and otherwise improving a town, the funds derived therefrom were held to constitute a charity. And the Vice Chancellor (Sir John Leach) there said: "I am of opinion that funds supplied from the gift

of the crown, or from the gift of the legislature, or from private gift, for any legal, public or general purpose, are charitable funds to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public or general purposes being within the equity of that statute. Thus, . . . a gift to build a sessions house for a county, a gift by parliament . . . for the purpose of rebuilding St. Paul's Church, after the fire in London, have all been held to be charitable uses within the equity of the statute of Elizabeth."

These English cases are cited with approval in the opinion of the Supreme Court of Pennsylvania in Wright vs. Linn, supra, and the deduction therefrom made, "that every kind of legal public benefaction is included in the notion of charity."

In Coggeshall vs. Pelton, 7 Johns, Ch. 292, a pecuniary legacy to the town of New Rochelle, for the purpose of erecting a town house for transacting town business, was held to be a valid charitable bequest. In Magill vs. Brown, supra, a bequest to a town for a fire-engine and hose was sustained as for a charitable use. These two latter cases were cited with approval in Cresson's Appeal, 30 Pa., 437, 450, wherein it was held that a legacy, the income of which was to be "annually forever expended in planting and renewing shade trees especially in situations now exposing my fellow citizens to the heat of the sun," and a legacy "to endow a professorship of the fine arts" in the University of Pennsylvania, were good bequests to charitable uses. The Court there said: "Charity has been defined to be a general public use. Amb. 651."

In Fire Insurance Patrol vs. Boyd, 120 Pa. 624, 644, 645, it was held, that the Fire Insurance Patrol of Philadelphia, a corporation to save life and property in and contiguous to burning buildings, being without money capital, but supported by voluntary contributions of fire insurance companies, making and dividing no

profits and saving property, whether insured or not, is a public charity. In the course of its opinion the Court approved Lord Camden's definition of a charity expressed in Jones vs. Williams, supra, and also quoted approvingly the definition of a charity formulated by Mr. Justice Gray in Jackson vs. Phillips, 14 Allen, 539, 556, as follows: "A charity in legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings, or works, or otherwise lessening the burdens of government."

In Perin vs. Carey, 24 How., 465, 506, the Supreme Court of the United States said: "All property held for public purposes is held as a charitable use in the legal sense of the term charity." And in Ould vs. Washington Hospital for Foundlings, supra, the Court declared: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man."

Guided by the foregoing authorities, we confidently reach the conclusion that the grant by the Penns of the lot of ground in controversy in trust for the erection thereon of a court house for public use and service of the County of Northampton was a grant for a charitable use in the legal sense. Now, as we have already seen, the deed of conveyance contains no express provision for a forfeiture or reverter to the grantors or their heirs in the event of non-user or mis-user, and, in the absence of such express provision, no right or re-entry to defeat the charitable use is to be implied. It follows, therefore, that the plaintiff was without title to maintain this ejectment. For the non-use or mis-use of the trust property the County of Northampton is answerable

only to those immediately interested in the trust or to the Commonwealth of Pennsylvania. Barr vs. Weld, supra; Vidal vs. Girard's Executors, 2 How., 127, 191; In re Mercer Home, supra.

The Court below was right in instructing the jury to find a verdict for the defendants, and accordingly the judgment is affirmed.

May, 1896.

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no more than a direction to the trustees as to the use to be made of the land after it had been acquired.

The language of the habendum that the conveyance is "in trust," nevertheless to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever, under the decisions of the courts of Pennsylvania amounted simply to conforming the grant to the legislative authority previously given, and cannot be deemed to have imported a limitation of the fee.

The purposes of the grant by the patent of 1764 of the lot in the centre of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation.

Without positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752, it is *held*, that the trial court did not err in directing a verdict for the defendant.

By an act of the general assembly of the Province of Pennsylvania, passed on March 11, 1752, Penn. Provincial Laws 1775, p. 235, c. 2, the county of Northampton was erected out of a portion of the county of Bucks. In the sixth and seventh clauses of the act it was provided as follows:

"VI. And be it further enacted by the authority aforesaid, That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town (of Easton,) in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants.

"VII. And be it further enacted by the authority aforesaid, That for the defraying the charges of purchasing the land, building and erecting the court house and prison aforesaid, it shall and may be lawful to and for the commissioners and as-

sessors of the said county, or a majority of them, to assess and levy, and they are hereby required to assess and levy so much money as the said trustees, or any three of them, shall judge necessary for purchasing the land and finishing the said court house and prison. Provided, always, the sum of money, so to be raised, does not exceed three hundred pounds, current money of this province."

On March 4, 1753, an act was passed in which it was recited that the amount specified in the act of March 11, 1752, had been expended in building a prison, and authority was given to assess and levy a further sum not exceeding a stated amount, as the persons named in the act, or any three of them, should judge necessary for building a court house and finishing the prison already erected.

On July 9, 1762, the following warrant of survey was issued:

"PENNSYLVANIA, *ss.*

"*By the Proprietaries.*

"Whereas in and by an act of General Assembly of this Province entitled 'An Act of erecting the Northwest part of Bucks into a separate County,' which in and by the said act is called Northampton and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed Trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the said County, and thereon to erect and build a Court House and Prison sufficient to accommodate the public service of the said County, and for the ease and convenience of the inhabitants, as in and by the said act appears. And whereas on application and request of said Trustees, and out of our regard to encourage and promote the Improvement of the said Town and general good and convenience of the inhabitants of the said County, we have condescended and agreed to grant to the said trustees a lot or piece of ground of Eighty Feet square to be laid out in the centre of the great square in the middle of the said Town of Easton for a Court House for the use and the accommodation of the inhabitants of the said town and County forever. These are

therefore to require you to survey and lay out, or cause to be surveyed and laid out, a lot or piece of ground in the centre of the great Square in the said Town of Easton of the said dimensions of Eighty feet square for the public use of a Court House for the inhabitants of the said town and county, and make return thereof into our Secretary's Office in order for confirmation to the said Trustees and their heirs for the use aforesaid, and for your so doing this shall be your sufficient Warrant.

"Given under my hand and the seal of the Land Office, by virtue of certain powers from the said Proprietaries at Philadelphia, the ninth day of July, 1762.

"To JOHN LUKENS, JAMES HAMILTON.
"*Surveyor General.*"

A survey was made and returned, in which it was recited:

"In pursuance of a Warrant dated the 9th day of July, 1762. Surveyed the 8th day of October, 1763, to Thomas Craig and others the above described Lot of Ground Situate in the Public Square of the Town of Easton in the County of Northampton. Containing in length North & South eighty feet and in breadth East & West eighty feet."

Forming part of the certificate was a plat exhibiting a large open space, three hundred and twenty feet square, intersected from north to south and east to west by two eighty feet wide streets (Northampton and Pomfret). In the centre of the open space referred to, facing the streets mentioned, was a square plot of ground, marked as being eighty feet on each side.

On September 8, 1764, a patent was executed as follows:

"Thomas Penn & Richard Penn Esquires true and absolute Proprietaries and Governors in Chief of the Province of Pennsylvania & Counties of Newcastle Kent and Sussex upon Delaware To all unto whom these Presents shall come Greeting Whereas in and by an Act of General Assembly of the said Province passed in the twenty fifth year of the Reign of our late Sovereign Lord the Second Intituled 'An Act for Erecting the North West part of Bucks into a sepa-

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rate County' which in and by the said Act is called Northampton and John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse or any of them are appointed Trustees to purchase and take Assurance to them and their Heirs of a Piece of Land situate in some convenient Place in the Town of Easton in the said County and thereon to erect and build a Court House & Prison sufficient to accommodate the public Service of the said County as by the said Act appears And whereas in Pursuance of a Warrant dated the ninth of July 1762 under the Seal of our Land Office we have at the special Instance & Request of the said Trustees caused a Lot of Ground situate in the Center of the said Town of Easton to be laid out for a Court House for the Public Use and Service of the said County (another Lot of Ground in the said Town having been heretofore laid out for a Prison or Common Gaol erected thereon) which said lot in the Center Square contains in Length North and South eighty feet and in Breadth East and West eighty feet As by the said Warrant and Survey of the said Lot remaining in the Surveyor Generals Office and from thence Certified into our Secretarys Office more fully appears Now know ye that for the further Encouragement and better promoting the Public Benefit and Service of the said Town and County And for and in Consideration of the yearly Quitrent herein after reserved | and of the Sum of Five Shillings to us in Hand paid by the said Trustees (The Receipt whereof is hereby acknowledged) We have given granted released confirmed & by these Presents do give grant release and confirm unto the said Trustees John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse and their Heirs the said Lot of Ground situate in the Center of the Great Square in the said Town of Easton containing Eighty feet in Length North & South and eighty feet in breadth East and West Together with all Ways Waters Watercourses Liberties Easements Privileges Profits Commodities Advantages and Appurtenances thereto belonging And the Reversions and Remainders thereof To have and to hold the said herein before described Lot of Ground with the Appurtenances unto

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the said John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse their Heirs and Assigns for ever In Trust nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever to be holden of us our Heirs and Successors Proprietaries of Pennsylvania as of our Manor of Fermor in the County of Northampton aforesaid in free and common Soccage by Fealty only in Lieu of all other Services Yielding & Paying therefor yearly unto us, our Heirs and Successors, at the Town of Easton aforesaid at or upon the first day of March in every Year from the first day of March next one Red Rose for the same or value thereof in Coin Current according as the Exchange shall then be between our said Province and the City of London to such Person or Persons as shall from Time to Time be appointed to receive the same And in Case of Nonpayment thereof within ninety days next after the same shall become due That then it shall and may be lawful for us our Heirs and Successors our and | their Receiver or Receivers into and upon the hereby granted Lot or Piece of Ground and Premises to Reenter and the same to hold and Possess until the said Quitrent and all arrears thereof Together with the Charges accruing by Means of such Nonpayment and Reentry be fully paid and discharged

"Witness John Penn Esquire Lieutenant Governor of the said Province who by virtue of certain Powers and Authorities to him for this Purpose inter alia granted by the said Proprietaries hath hereunto set his Hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this twenty eighth day of September, in the Year of our Lord one thousand seven hundred and sixty four The Fourth year of the Reign of George the Third the King over Great Brittain &c And Forty seventh Year of the said Proprietaries Government."

A court house was built upon the property between the years 1763 and 1766 and remained thereon until the year 1862, when it was removed. No buildings have since been placed upon the ground, but it was asserted in argument that a public fountain had been erected thereon.

Statement of the Case.

By an act of the general assembly of Pennsylvania of date April 15, 1834, the title of the trustees was vested in the county of Northampton.

On July 25, 1888, William Stuart, as sole heir of the original grantors, by his duly authorized attorney, made entry upon the lot in question for a breach of an alleged condition as to its use, claimed to have been incorporated in the patent of 1764, and which, it was asserted, revested the land in the claimant as succeeding to the rights of the original grantors. Being ousted by the representatives of the county of Northampton and the citizens of Easton, Stuart soon after instituted an action of ejectment in the United States Circuit Court for the Eastern District of Pennsylvania to recover possession of the land. At the trial a verdict was directed for the defendant, and the case subsequently came into this court for review, when the judgment was reversed because of an omission of the plaintiff to properly plead his alienage. 156 U. S. 46. Thereafter, William Stuart having died, his son, the present plaintiff in error, was substituted as plaintiff, and, the pleadings having been amended, a new trial of the action was had in April, 1895. During the course of the trial counsel for the plaintiff separately offered in evidence:

1. A certified copy of the deed referred to in the acts of 1752 and 1753, acquiring land on which to erect a prison, stating that he proposed to follow this by the offer of a subsequent grant to the county by the heirs of Penn of the reversion of the prison lands. The purpose of the offer was declared to be to throw light on the terms of the grant of land for the court house, and thereby to demonstrate that the county was estopped from claiming that the grant of such land by the patent of 1764 was not upon a condition.

2. A deed by Granville John Penn and Richard Penn to the county of Northampton, dated in 1852, for the reversion in the prison lot, which was offered for two purposes: first, for the former purpose of establishing an estoppel upon the county; and, second, to show grants by Penn of land in the township of Easton subsequent to the Divesting Act; to be followed by other deeds made by Penn subsequent to the Divesting Act.

Counsel for Parties.

The Divesting Act referred to was an act passed November 27, 1779, (1 Smith's Laws, 479,) vesting the title to the Province of Pennsylvania in the Commonwealth.

3. A deed by John Penn to Peter Schuyler et al., for a lot in the county of Easton, subsequent to the Divesting Act.

4. A certified copy from the books of the land office, showing that the records of the Department of Internal Affairs of Pennsylvania contain a number of warrants issued for lots in the town of Easton, Pennsylvania, and surveys made in pursuance thereof, and lots granted by the proprietaries of the Province of Pennsylvania.

5. That no evidence can be found to indicate that any warrants were issued, and surveys made or patents granted by the Commonwealth of Pennsylvania for any lots in the town of Easton, Pennsylvania.

Offers Nos. 3, 4 and 5, it is claimed in argument, were made to establish that the property in question was part of the private estate of the Penns, preserved to them by section 8 of the Divesting Act.

Upon objection that the evidence was irrelevant to the issue, it was excluded, and exceptions to such rulings were reserved.

At the close of the testimony for the plaintiff, counsel for defendant moved the court to direct a verdict for the defendant. This motion was granted, the court instructing the jury that the deed on its face was a conveyance to trustees for the use and benefit of the people of Northampton County in the erection and use of public buildings, and that the land had not reverted to the grantors by a diversion of the use. Judgment having been entered in favor of the defendants, the cause was taken by writ of error to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the judgment. 39 U. S. App. 238. A writ of certiorari was subsequently allowed by this court.

*Mr. C. Berkeley Taylor* and *Mr. A. T. Freedley* for Stuart. *Mr. William Brooke Rawle* was on their brief.

*Mr. Aaron Goldsmith* and *Mr. Edward J. Fox* for Easton.

Opinion of the Court.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The errors assigned are misdirection in instructing the jury to render a verdict for the defendant and wrongful exclusion of the offered evidence. We at once dismiss the latter assignments from consideration. The evidence offered to aid in the construction of the patent was clearly incompetent, as the patent, being a written instrument, its construction and legal effect were a matter for the court, and, even if an estoppel had been pleaded, the excluded evidence could not have estopped the county from asserting that the patent of 1764 had the meaning contended for. As regards the evidence offered to establish that the rights of the proprietaries, if any, in the property in question had not been cut off by the Divesting Act, the evidence, if not cumulative, was clearly not material, if by the terms of the patent, as we hold to be the case, no interest in the land granted thereby remained in the grantors.

*Did the trial court improperly direct a verdict for the defendant?*

This question requires an interpretation of the grant contained in the patent of 1764; and, as the question arising on such construction relates to the title to real property, we must, in reaching a conclusion, be guided by the local law of Pennsylvania, the State in which the land is situated.

We premise our examination of the terms of the patent with the following extract from the opinion delivered by Kennedy, J., in *Ingersoll* v. *Sergeant*, 1 Wharton, 337, 348:

"King Charles the 2nd, in granting the Province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage, and by fealty only, for all services. And by the seventeenth section thereof, William Penn, his heirs and assigns had full and absolute power given to them, at all times thereafter, and forever, to assign, alien, grant, demise or enfeoff such parts and parcels thereof to such persons as might be willing to purchase the same, their heirs and assigns, in fee simple, fee tail, for term of life, lives or years,

# STUART *v.* EASTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 197. Argued April 12, 13, 1898. — Decided May 9, 1898.

The construction and legal effect of a patent for land is matter for the court, and evidence to aid in that construction is incompetent.

The clear intent of the act of the Province of Pennsylvania of March 11, 1752, authorizing trustees to acquire the land in question, was, that while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county; and the provision following the authorization to acquire the land, "and thereon to erect and build a court house and prison," was

to be held of the said William Penn, his heirs and assigns as of the seigniory of Windsor by such services, customs and rents as should seem fit, to the said William Penn, his heirs and assigns, and not immediately of the said King Charles, his heirs or successors. And, again, by the 18th section, it was further provided, that the purchasers from William Penn, his heirs or assigns, should hold such estates as might be granted to them, either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns, should seem expedient, the statute of *quia emptores terrarum* in anywise notwithstanding."

The proper construction of the patent in question is free from difficulty when construed in connection with the act of the assembly to which the patent refers. The act of 1752 constituted the authority of the trustees for acquiring the land in question, and that authority was to the individuals named in the act "to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town of Easton, in trust and for the use of the inhabitants of the said county." The inhabitants of the county of Northampton not being a corporation, were unable to take a direct conveyance of the land, but the clear intention of the statute was that while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county. The provision following the authorization to acquire the land, "and thereon to erect and build a court house and prison," was no more than a direction to the trustees as to the mode of use to be made of the land after it had been purchased.

The authority to the trustees being to "purchase," adds force to the clear implication that it was the intention of the assembly that a title in fee simple should be acquired. When, therefore, we find a recital in the patent that it is conveyed upon a named consideration, and the patent expressly refers to the act of the assembly as the authority from which the patentees derived the power to take and hold the property, we naturally infer an intention of the parties on the one hand to convey, and on the other to receive, just such an estate in

the land as the act contemplated. It is true that the consideration is apparently nominal, but, at common law, in a deed like the one in question, a pecuniary consideration, however small, was sufficient to divest the title. *Queen* v. *Porter*, 1 Rep. 22, 26; *Van Der Volgen* v. *Yates*, 9 N. Y. 219.

The patent expressly purports to convey the fee, the reservation of an annual quitrent of a red rose being merely a feudal acknowledgment of tenure, *Marshall* v. *Conrad*, 5 Call, 364, 398, which was in effect annulled by the Revolution and acts of the assembly of Pennsylvania subsequently passed, declaring all lands within the Commonwealth to be held by a title purely allodial. In the premises the grant is to the trustees by name "and their heirs," while the habendum is to the individuals theretofore referred to as the trustees, "their heirs and assigns forever. In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever." This last clause, it is claimed, qualifies the prior grant of an estate in fee, and limits the duration of the estate in the land to the period while the land was used as the site of a court house. But, it will be remembered, that the act of 1752 authorized the acquisition of a lot upon which the trustees were directed to build a court house *and prison*, and the act of 1753 recited that the amount authorized by the act of 1752 to be expended for a court house and prison had already been expended for building a prison, and authority was given to assess and levy a further sum for the erection of a court house. The patent of 1764 recited the fact that another lot of ground had been laid out for a prison site, and it may be well in reason considered that had the act of 1752 authorized solely the erection of a court house instead of a court house and prison, that the clause to which we have referred would have simply recited that the patentees were to hold the land for the uses and purposes mentioned in the act of the assembly. In the condition in which matters stood, however, the recital that the land was to be held in trust for the object stated may well be treated as having been inserted with the intent of showing that the grant related alone to one

of the purposes covered by the law, the court house, and not to both therein expressed; that is, the prison and the court house. Be it as it may, however, under the facts disclosed by the record, the decisions of the courts of Pennsylvania leave no doubt that the clause in question cannot be construed as anything more than a recognition of the trust previously created by the act of the general assembly, and that it amounted simply to conforming the grant to the legislative authority previously given, and that it cannot be deemed to have imported a limitation of the fee. Thus in *Slegel* v. *Lauer*, 148 Penn. St. 236, whilst it was held that the grant there considered, though absolute in terms, merely conveyed a fee on limitation, because the purpose expressed in the grant was not one for which counties usually acquired a fee simple in lands, the court reviewed the cases of *Kerlin* v. *Campbell*, 15 Penn. St. 500; *Griffitts* v. *Cope*, 17 Penn. St. 96; *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415, and *Seebold* v. *Shitler*, 34 Penn. St. 133, and declared the doctrine established by those cases to be that where a conveyance purporting to be in fee is made to public trustees or commissioners, religious societies, etc., for the particular purpose for which the grantees could lawfully hold real estate, such declaration could not be construed as qualifying a prior grant of the fee. The court said (p. 241):

"Of course, the mere expression of a purpose will not of and by itself debase a fee. Thus, a grant in fee simple to county commissioners of land 'for the use of the inhabitants of the Delaware County to accommodate the public service of the county,' was held not to create a base fee: *Kerlin* v. *Campbell*, 15 Penn. St. 500; as also a grant to county commissioners and their successors in office of a tract of land with a brick court house thereon erected, 'in trust for the use of said county, in fee simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a court house, jail and offices for the safe keeping of the records: *Seebold* v. *Shitler*, 34 Penn. St. 133. Similarly a devise of land to a religious body in fee 'there to build a meeting house upon,' etc., was held to pass an unquali-

fied estate: *Griffitts* v. *Cope*, 17 Penn. St. 96; as was also a grant to a congregation 'for the benefit, use and behoof of the poor of said . . . congregation, . . . forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and if occasion shall require, a place to bury their dead:' *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415. . . .

"It is apparent in all the cases cited that the purposes for which the grants were made were really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can, in no event take a fee simple absolute, because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration, in the grant, that it is conveyed for those uses cannot be deemed to import a limitation of the fee. *Expressio eorum quæ tacite insunt nihil operatur.* Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant."

The case at bar is precisely analogous in its main features to the facts which were under consideration in *Kerlin* v. *Campbell*, *supra*, the only difference being that in the case just cited, instead of the purpose for which the land was to be held being specified in the grant, a declaration of trust was made in a separate instrument. The facts in the *Kerlin case* were as follows: Certain public buildings had been erected on land and the land with the erections was sold to a private individual. Subsequently, five named individuals, or any three of them, were authorized by statute "to take conveyances and assurances to them, and their heirs, of the said old court house, and of the prison and workhouse, in the said borough of Chester, with the lots of ground thereunto belonging, in trust, and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county." A deed was made in pursuance of this act to the individuals named "and to their heirs and assigns" for an expressed consideration, "to have and to hold the same to them, their heirs and assigns forever." A declaration of trust was made contemporaneously with the deed, reciting

that the latter instrument had been made or was intended to be "in trust and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the said recited act of assembly;" and also declaring that the interest held in the land and buildings was "only to and for the uses and services hereinbefore mentioned, expressed and declared, and to and for no other use, interest or purpose whatsoever." A part of the lot and the workhouse building thereon having been subsequently sold to a private individual under authority of an act of assembly, the heirs of the original grantor brought ejectment to recover possession, upon the ground that the property was granted for a grossly inadequate consideration, if the unrestricted fee was conveyed, and that the deed to the individuals named in the original act and the declaration of trust by them executed was but a single transaction and constituted a conveyance to the parties named, in trust to and for the use of the inhabitants of the county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the act of assembly, and to no other use, intent or purpose whatsoever, and that the estate which the trustees took was a base or determinable fee; in other words, an interest which might continue forever, but was liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. On the part of the defendants in error it was contended that the transaction was a purchase, and not a trust. The court said (p. 506):

"The doctrine of charitable uses is inapplicable to a question like the present. Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way, he might have had a plausible case on the cessation of the user; but he conveyed it for its value, by an absolute deed, to persons who executed a declaration of trust, not for his benefit, but to vest the equitable ownership in the county. After that, it is impossible to conceive of a dormant interest in him. The two deeds, though executed at the same time, were as diverse as if the latter were a conveyance of the legal title to a stranger,

with whom the grantor in the first could not be in privity. There could be no resulting trust, for every part and particle of the grantor's estate, legal or equitable, present or prospective, had passed from him and was paid for. Nor was the estate granted a base fee. It was unclogged with conditions or limitations. The ancestor received a full consideration for it; and the plaintiffs cannot rescind the bargain."

We think the two cases are not distinguishable in principle. The purpose of the grant by the patent of 1764 of the lot in the centre of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title. While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, conjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted and a declaration of the trust made in an independent instrument.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that; provided; if it shall happen;* etc., 4 Kent Com. note *b*, p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled with any clause of reëntry or a provision that the estate conveyed should cease or be void on any contingency. (Ib.) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while; so long as; un-*

*til; during;* &c., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.

The cases mainly relied upon as supporting the claim of the plaintiff in error that by the patent an estate was conveyed which was "to be commensurate in duration with the purpose to be answered by it," clearly present no analogy in their facts to the case at bar. Thus, in *Kirk* v. *King*, 3 Penn. St. 436, 438, the material part of the conveyance reads as follows:

"Know all men by these presents, that I, Thomas McElroy, of Plum township, in the county of Allegheny, for and in consideration of the sum of 50 cents to me in hand paid, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, to the employers of the school at Plum Creek meeting house that lot of land, beginning [describing it], to have and to hold said lot for an English school house and no other purpose, for me, my heirs, and assigns, to them who are now, or may hereafter be the employers of said school, to have and to hold the same forever for said purpose.

"Witness my hand and seal," etc.

It will be noticed that the deed did not contain words of inheritance or expressly purport to convey a fee simple; and in *Wright* v. *Linn*, 9 Penn. St. 433, the decision in *Kirk* v. *King* was construed to hold that "The legal title remained in the original owner, the 'school company' having but an equity, which was thought to be dependent on the agreement to use the ground 'for an English school house and for no other purpose.'" In other words, the deed was construed as making the substantial consideration of the grant the erection of the school house, and as though the land was conveyed, in terms, to the grantees, to have and to hold the same *so long* as they used it for an English school house. And the court in the *Wright case*, while questioning the correctness of the holding

in the *Kirk case*, that the deed there considered did not establish a trust for a charitable use, not liable to be defeated by non user, said (p. 438):

"It has long been held, that money given to build or repair a church, is given to a charitable use; and surely it must be agreed that land given as the site of a public school house, *prima facie*, stands in the same category. It may be otherwise where the object in the contemplation of the party is ephemeral, and the subject sought to be promoted is intended to be of temporary duration. This is the point on which *Kirk* v. *King* was made to turn; and, where such is the case, perhaps the grant may be taken as on an implied condition of reverter, as soon as the temporary object is accomplished. But such a condition should either expressly appear or be unerringly indicated by the circumstances attendant on the gift."

The object to be attained by the grant in the case at bar was, however, not ephemeral in its character, the assurance being expressly to the trustees and their heirs and assigns forever; while the attendant circumstances we have heretofore alluded to rebut any inference of an implied reverter.

*Scheetz* v. *Fitzwater*, 5 Penn. St. 126, also relied on, was the case of a conveyance "of a certain mill dam or pond of water, and mill race or stream of water, issuing and proceeding from said mill dam or pond of water, as the same is now situate, and being in and upon a certain tract or parcel of land situate in the manor of Springfield, together also with the site and soil of the said mill pond or dam of water and race of water, and also one perch of land on each and every side of the said pond, or dam and race of water, to and for the use and service of a certain mill, with the land thereto belonging, and for no other use whatsoever." The deed did not contain words of inheritance or expressly grant a fee simple. The grant was of the mill dam, etc., and, in the same sentence, the qualification was attached that it was for a particular use only, that is, "for the use and service of a certain mill, with the land thereto belonging."

The mill pond having been drained and converted into a

meadow, the claim was made that there had been a diversion from the purposes of the grant, and an action was commenced for the taking of grass from the site of the mill pond. The trial judge held that a fee simple estate in the land had not been conveyed, but that it was the intention of the grantor to only convey a qualified interest in the land or limited fee, and to retain a reversionary interest, and that the estate in the grantee determined on the abandonment of the use and service for which the conveyance had been made as stated in the deed. The appellate court held this construction to be correct.

*First Methodist Episcopal Church* v. *Old Columbia Public Ground Co.*, 103 Penn. St. 608, is relied upon as sustaining the proposition that where a deed refers to a certain mode of user of the land conveyed, coupled with words such as "and for no other use," a conditional estate is granted. The decision, however, does not justify this broad statement. The action was ejectment. One Wright had covenanted under seal to convey certain property to named parties, their heirs or assigns, in fee simple, clear of all incumbrances, in trust for the sole use of a company which might thereafter be formed for the purpose of bringing a supply of water into the borough of Columbia, the grantees covenanting to give, grant and assure unto Wright, his heirs and assigns, when a reservoir should be erected, "the privilege of erecting a hydrant at said reservoir at his own expense and for his own use, and shall have a supply of water therefrom sufficient to water his cattle or stock or for the use of a family at all times when the same is in repair or water sufficient therein." A deed was subsequently made to the water company, and that corporation constructed a reservoir on the land, but subsequently abandoned the same, filled up the reservoir and sold the land, and the purchaser erected a chapel thereon. Ejectment was brought by the grantees of the heirs of Wright to recover possession of the land. The trial judge held that under the agreement first referred to the grantees took a base or qualified fee only, and when they and their vendees ceased to use the land for a reservoir it reverted to Wright or his heirs.

The appellate court, however, held that a conditional estate had not been created by the deed, and discussed the effect of the grant solely as to whether an estate upon condition subsequent was created. After reviewing various authorities holding that a mere recital in a deed that it was made upon a certain consideration, while it might create a covenant, would not raise a condition, the court said (p. 614):

"Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. *Labaree* v. *Carleton*, 53 Maine, 211. It was said by Mr. Chief Justice Bigelow in *Packard et al.* v. *Ames et al.* 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act by the grantee on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. *Cook* v. *Trimble*, 9 Watts, 15.

"Turning to the writing executed by Wright, we see that he absolutely and unconditionally covenanted to convey the premises in fee simple clear of all incumbrances to the vendees, their heirs, or assigns, whenever requested by them. No restraint was imposed on an alienation of the land. No construction of a reservoir, nor any work on the ground, was required to precede the right to demand a deed. No clause provided for a forfeiture or termination of the estate, in case the land ceased to be used as a reservoir. No right of reëntry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used, equivalent thereto or proper to create a condition. The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate."

At page 613 of the opinion, it is true, the cases of *Kirk* v. *King* and *Scheetz* v. *Fitzwater* are referred to as though the

grants considered in those cases were of estates upon condition subsequent, and as illustrating the proposition that words clearly equivalent to the technical words usually employed to create a condition would be sufficient. Weight was attached to the circumstance that the grants in those cases were expressed to be for a particular named use, "and no other purpose;" but it is manifest that importance was attached not alone to the emphatic statement of the particular use expressed, but to that language coupled with the other provisions of the grant.

But, manifestly, under the authorities referred to in the *Slegel case* which we have above cited, the declaration of the purposes contained in the patent under consideration had not the effect of qualifying or limiting the estate in fee expressly granted to the trustees for the benefit of the inhabitants of the county, and which has since become vested, by act of the legislature, in the county of Northampton. Without, however, positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752, *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415, 425, we hold that the trial court did not err in directing a verdict for the defendant, and the judgment of the Circuit Court of Appeals must therefore be

*Affirmed.*

MR. JUSTICE BROWN concurred in the result.